FILED
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No. 93-1001

In The Supreme Court of the United States

October Term, 1993

Allied-Bruce Terminix Companies, Inc., and Terminix International Company,
Petitioners,

v.

G. Michael Dobson, Wanda C. Dobson, Steven Gwin and Jan Gwin,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

JOINT APPENDIX

H. Bartow Farr, III *
Farr, Smith & Taranto
2445 M Street, NW
Washington, DC 20037
(202) 775-0184

Joseph P. Jones, Jr.
T. Julian Motes
Sirote & Permutt, P.C.
One St. Louis Centre
Post Office Drawer 2025
Mobile, AL 36652
(205) 432-1671
Counsel for Petitioners

* Counsel of Record

Allan R. Chason *
Chason & Chason, P.C.
Post Office Box 100
157 Hoyle Avenue
Bay Minette, AL 36507
(205) 937-2191
Counsel for Respondents

PETITION FOR CERTIORARI FILED DECEMBER 22, 1993
WRIT OF CERTIORARI GRANTED MARCH 21, 1994

107 PP

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
10/15/91	Complaint filed in CV 91-796
11/26/91	ANSWER (Steven C. Gwin and Jan A. Gwin)
11/26/91	ANSWER OF DEFT TERMINIX INTERNATIONAL COMPANY, L.P. TO PLTFS' COMPLAINT
11/26/91	ANSWER OF DEFT ALLIED-BRUCE TERMINIX COMPANIES, INC. D/B/A TERMINIX SERVICE TO PLTFS' COMPLAINT
12/6/91	ANSWER OF DEFTS STEVEN C. GWIN AND JAN A. GWIN (Amended)
2/14/92	MOTION FOR SUMMARY JUDGMENT
6/25/93	FIRST AMENDED COMPLAINT
6/30/92	MOTION FOR SUMMARY JUDGMENT
7/2/92	MOTION OF DEFT, ALLIED-BRUCE TERMINIX COMPANIES, INC. D/B/A TERMINIX SERVICE AND TERMINIX INTERNATIONAL COMPANY, L.P. TO STRIKE FIRST AMENDED COMPLAINT FILED BY PLTFS
7/2/92	MOTION OF DEFTS, ALLIED-BRUCE TERMINIX COMPANIES, INC. D/B/A TERMINIX SERVICE AND TERMINIX INTERNATIONAL COMPANY, L.P. TO STRIKE CROSS-CLAIM FILED BY DEFTS STEVEN C. GWIN AND JAN A. GWIN
7/6/92	ANSWER OF DEFTS STEVEN C. GWIN AND JAN A. GWIN TO AMENDED COMPLAINT
7/6/92	RESPONSE OF DEFTS, ALLIED-BRUCE TERMINIX COMPANIES, INC. D/B/A TERMINIX SERVICE AND TERMINIX INTERNATIONAL COMPANY, L.P., IN OPPOSITION TO MOTION TO COMPEL FILED BY PLTFS, G. MICHAEL DOBSON AND WANDA C. DOBSON

DATE	PROCEEDINGS
7/31/92	STATEMENT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT
8/3/92	MEMORANDUM BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT
8/7/92	DEFT'S REPLY BRIEF IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT
8/14/92	MOTION OF DEFTS, ALLIED-BRUCE TERMINIX COMPANIES, INC. D/B/A TERMINIX SERVICE AND TERMINIX INTERNATIONAL COMPANY, L.P., FOR STAY PENDING ARBITRATION AND FOR ORDER COMPELLING ARBITRATION
8/14/92	AFFIDAVIT OF W. BRUCE ALVERSON IN SUPPORT OF MOTION BY DEFTS, ALLIED-BRUCE TERMINIX COMPANIES, INC. D/B/A TERMINIX SERVICE AND TERMINIX INTERNATIONAL CO. L.P., FOR STAY PENDING ARBITRATION AND FOR ORDER COMPELLING ARBITRATION
8/14/92	AFFIDAVIT OF DANIEL F. JOHNSON IN SUPPORT OF MOTION BY DEFTS, ALLIED-BRUCE TERMINIX COMPANIES, INC., D/B/A TERMINIX SERVICE AND TERMINIX INTERNATIONAL CO., L.P., FOR STAY PENDING ARBITRATION AND FOR ORDER COMPELLING ARBITRATION
8/26/92	Protective Order (copies mailed)
9/1/92	BRIEF OF G. MICHAEL DOBSON AND WANDA C. DOBSON IN OPPOSITION TO MOTION TO COMPEL ARBITRATION
10/27/92	MOTION OF DEFTS, ALLIED-BRUCE TERMINIX COMPANIES, INC., D/B/A TERMINIX SERVICE AND TERMINIX INTERNATIONAL COMPANY, L.P., FOR SEPARATE TRIAL OF CROSS-CLAIM

DATE	PROCEEDINGS
10/28/92	ANSWER OF DEFT TERMINIX INTERNATIONAL COMPANY, L.P., TO PLTFS' FIRST AMENDED COMPLAINT
10/28/92	ANSWER OF DEFT ALLIED-BRUCE TERMINIX COMPANIES, INC. D/B/A TERMINIX SERVICE TO PLTFS' FIRST AMENDED COMPLAINT
10/28/92	ANSWER OF DEFT TERMINIX INTERNATIONAL COMPANY, L.P. TO CROSS-CLAIM OF DEFTS, STEVEN C. GWIN AND JAN A. GWIN
10/28/92	ANSWER OF DEFT ALLIED-BRUCE TERMINIX COMPANIES, INC., D/B/A TERMINIX SERVICE TO CROSS-CLAIM OF DEFTS, STEVEN C. GWIN AND JAN A. GWIN
10/30/92	MOTION OF DEFT, ALLIED-BRUCE TERMINIX COMPANIES, INC., D/B/A TERMINIX SERVICE AND TERMINIX INTERNATIONAL COMPANY, L.P. FOR PARTIAL SUMMARY JUDGMENT
10/30/92	SUMMARY OF DEFTS, ALLIED-BRUCE TERMINIX COMPANIES, INC., D/B/A TERMINIX SERVICE AND TERMINIX INTERNATIONAL COMPANY, L.P., OF UNDISPUTED FACTS OFFERED IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT
11/5/92	OBJECTION TO MOTION FOR SEPARATE TRIAL
11/9/92	BRIEF OF DEFTS, ALLIED-BRUCE TERMINIX COMPANIES, INC. D/B/A TERMINIX SERVICE AND TERMINIX INTERNATIONAL COMPANY, L.P., IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT
12/14/92	Motion for Order compeling arbitration and for order of stay pending arbitration is denied

DATE	PROCEEDINGS
12/16/92	Notice of Appeal (Supreme Court)
12/16/92	Security for costs
12/16/92	MOTION OF DEFTS, ALLIED-BRUCE TERMINIX COMPANIES, INC., D/B/A TERMINIX SERVICE AND TERMINIX INTERNATIONAL COMPANY, L.P., FOR STAY OF ACTION PENDING APPEAL OF ORDER DENYING MOTION TO STAY PENDING ARBITRATION AND FOR ORDER COMPELLING ARBITRATION
12/22/92	This case is transferred to the administrative docket pending disposition on appeal
12/23/92	Order (to stay) copies mailed
12/23/92	Designation of record on appeal

Form Approved OMB No. 2900-0152

VETERANS ADMINISTRATION
US DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WOOD DESTROYING INSECT INFORMATION
EXISTING CONSTRUCTION

1A. VA CASE NUMBER	7. DATE
	5/7/91
1B. HUD/FHA CASE NUMBER	

PRIVACY ACT INFORMATION - The information requested on this form will be used in evaluating the property for a VA or HUD insured loan. Although you are not required by law to provide information, failure to provide it can result in rejection of the property as security for your loan. The information collected will not be disclosed outside VA or HUD except as permitted by law. VA and HUD are authorized to request this information by statute *(38 U.S.C., 1810(b)(4) and 12 U.S.C., 1701 et seq.)*

READ THESE INSTRUCTIONS CAREFULLY BEFORE COMPLETING THIS FORM

1. The VA case number or HUD/FHA case number shall be inserted in Item 1 by the lender or the pest control company.
2. When treatment is indicated in Item 8C, the insects treated will be named, the data on application method and chemicals used shall be entered in Item 10. Proper control measures may include issuance of warranty. Warranty information should also be entered below. Proper control measures are those which follow good acceptable industry practices.
3. If visual evidence is found, the insects causing such evidence will be listed in Item 8A and damage resulting from such infestation will be noted in Item 8D.
4. Areas that were inaccessible or obstructed *(Item 7)* may include, but are not limited to, wall covering, fixed ceilings, floor coverings, furniture or stored articles. The Pest Control Operator (PCO) should list, in Item 7, those obstructions or areas which inhibit the inspection.
5. Item 8A may be checked when the PCO is not authorized to perform control measures by the owner/seller or control measures cannot be performed due to conditions beyond control, e.g. obstruction, weather, etc.
6. Visible, evidence of conditions conducive to infestation from subterranean termites shall be reported on reverse of the form *(earth-wood contact, faulty grades, insufficient ventilation, etc.)*.

3A. NAME OF INSPECTION COMPANY	5A. NAME OF PROPERTY OWNER/SELLER
Terminix Service	Steven Gwin
3B. ADDRESS OF INSPECTION COMPANY *(Include ZIP Code)*	**5B. ADDRESS OF PROPERTY**
P O Box 1830 Daphne, Al. 36526	114 Fels Ave Fairhope, Al. 36532
3C. TELEPHONE NUMBER *(Include Area Code)*	**4. PEST CONTROL OPERATOR LICENSE NUMBER**
205/928-5502	1002
	5C. STRUCTURE(S) INSPECTED
	Residence

FINDINGS

6. WERE ANY AREAS OF THE PROPERTY OBSTRUCTED OR INACCESSIBLE?	7. OBSTRUCTIONS OR INACCESSIBLE AREAS *(specify)* *(Read Item 11B before completing.)*
☒ Yes ☐ No *(If "Yes" complete Item 7)*	Behind interior and exterior wall coverings and under floor coverings.

8. BASED ON CAREFUL VISUAL INSPECTION OF THE READILY ACCESSIBLE AREAS OF THE PROPERTY *(See Item 11A before completing).*

☐ A. Visible evidence of wood destroying insects was observed. No control measures were performed. Insects observed:

☐ B. No visible evidence of infestation from wood destroying insects was observed.

☐ C. Visible evidence of infestation was noted; proper control measures were performed.

☒ D. Visible damage due to Subterranean Termites has been observed in the following areas: SEE ATTACHED GRAPH

☐ E. Visible evidence of previously treated infestation, which is now inactive, was observed. *(Explain in Item 10.)*

9. DAMAGE OBSERVED ABOVE, IF ANY. *(Check One)*	10. ADDITIONAL COMMENTS *(If necessary, continue on reverse.)*
☐ A. Will be/has been corrected by this company. ☐ B. Will be corrected by another company *(see attached contract)*. ☒ C. Will not be corrected by this company. Recommend that damage be evaluated by qualified building expert.	

11. STATEMENT OF PEST CONTROL OPERATOR

A. The inspection covered the readily accessible areas of the property, including attics and crawl spaces which permit entry. Special attention was given to those accessible areas which experience has shown to be particularly susceptible to attack by wood destroying insects. Probing and/or sounding of those areas and other visible accessible wood members showing evidence of infestation was performed.

B. The inspection did not include areas which were obstructed or inaccessible at the time of inspection. *(See instruction number 4 above.)*

C. This is not a structural damage report. Neither is this a warranty as to absence of wood destroying insects.

D. Neither I nor the company for which I am acting have had, presently have, or contemplate having any interest in the property. I do further state that neither I nor the company for which I am acting is associated in any way with any party to this transaction.

12A. SIGNATURE OF AUTHORIZED COMPANY REPRESENTATIVE	12B. TITLE	12C. DATE
John Buck	INSPECTOR	5/7/91

STATEMENT OF PURCHASER

I have received the original or a legible copy of this form.

14. SIGNATURE OF PURCHASER	15. DATE
S. Michael Dobson Wanda C. Dobson	5/10/91

VA FORM 26-8850
HUD 92053 (APR 1983)

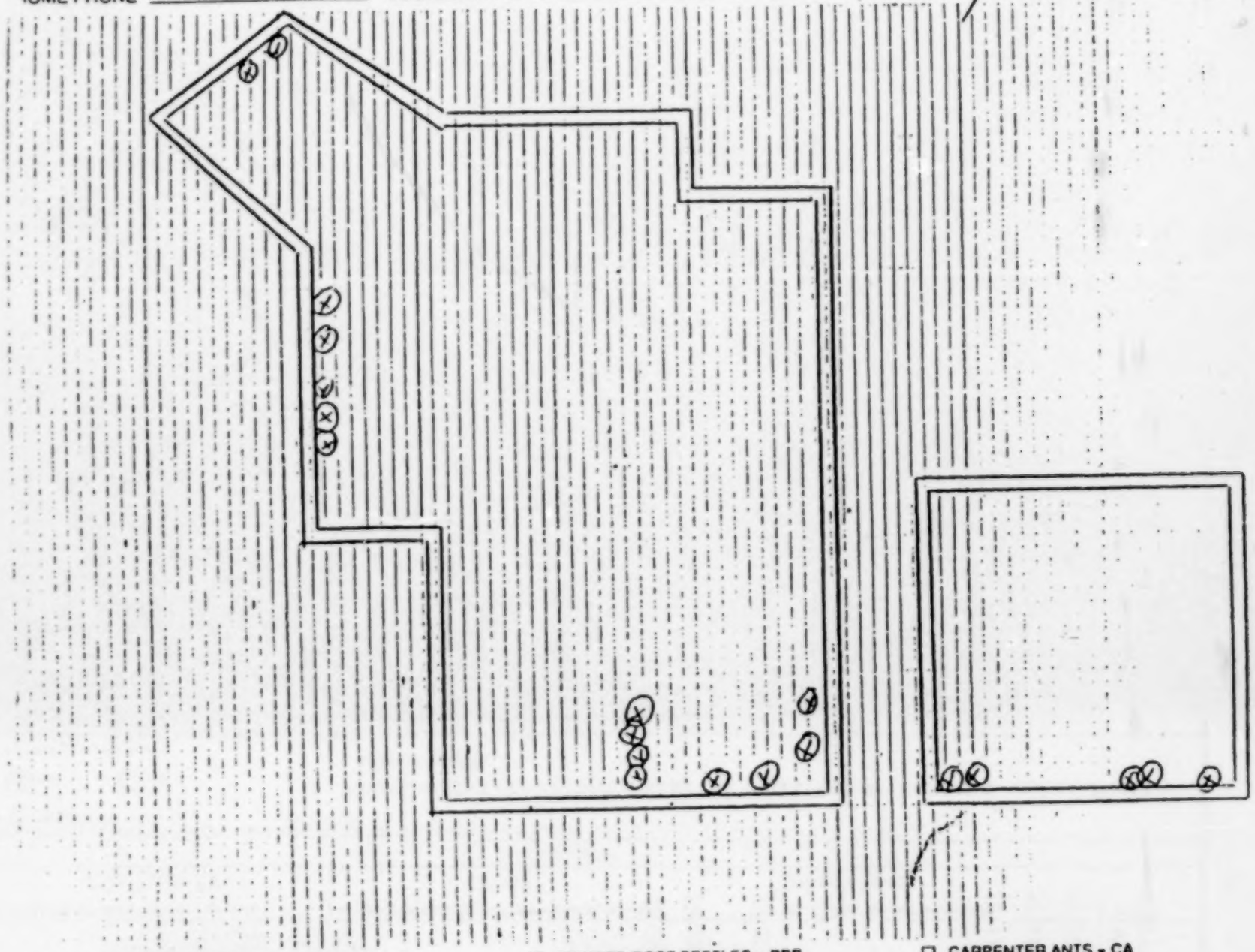
TERMINIX INSPECTION GRAPH

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OWNER'S NAME Steven Gwin OCCUPANT _____ DATE 5-7-91

TREATING ADDRESS 114 Fels Ave CITY Fairhope STATE AL. ZIP 36532

HOME PHONE _____ BUSINESS PHONE _____ INSPECTED BY John Burk



KEY:
- ☐ SUBTERRANEAN TERMITES = XXX
- ☐ DRYWOOD TERMITES = KKK
- ☐ DAMPWOOD TERMITES = ZZZ
- ☐ EXISTING DAMAGE = ⊗
- ☐ POWDER-POST BEETLES = PPB
- ☐ WOOD BORING BEETLES = WB
- ☐ FUNGUS = F
- ☐ WELL/CISTERN = W/C
- ☐ CARPENTER ANTS = CA
- ☐ CELLULOSE DEBRIS = CD
- ☐ EXCESSIVE MOISTURE = EM
- ☐ FAULTY GRADE = FG
- ☐ EARTH-WOOD CONTACTS = EC

TYPE OF CONSTRUCTION: ☑ CRAWL SPACE ☐ BASEMENT ☐ MONOLITHIC SLAB ☑ FLOATING SLAB ☐ SUPPORTED SLAB

TYPE OF FOUNDATION: ☐ CONCRETE ☑ HOLLOW BLOCK ☐ BRICK ☐ STONE ☐ OTHER _____

PROPERTY HAS A: 1. WELL ☐ YES ☐ NO 2. CISTERN ☐ YES ☐ NO 3. SUMP PUMP ☐ YES ☐ NO 4. FRENCH DRAIN ☐ YES ☐ NO

INSPECTOR'S STATEMENT OF VISIBLE DAMAGE

OLD TERMITE AND MOISTURE DAMAGE TO UNDERNEATH OF STRUCTURES AS MARKED ON GRAPH

BY: John Burk DATE: 5-7-91

CONTROL TECHNICIAN'S STATEMENT OF VISIBLE DAMAGE

BY: _____ DATE: _____

TERMINIX IS NOT RESPONSIBLE FOR REPAIRS TO DAMAGES DISCLOSED ABOVE IN ADDITION, HIDDEN DAMAGE MAY EXIST IN CONCEALED OR INACCESSIBLE AREAS. TERMINIX CANNOT GUARANTEE THAT THE DAMAGE DISCLOSED BY VISUAL INSPECTION OF THE PREMISES SHOWN ABOVE REPRESENTS THE ENTIRETY OF THE DAMAGE WHICH MAY EXIST AS OF THE DATE OF THE INITIAL CONTROL APPLICATION. TERMINIX SHALL NOT BE RESPONSIBLE FOR REPAIR OF ANY EXISTING DAMAGE, INCLUDING WITHOUT LIMITATION ANY DAMAGE WHICH EXISTED IN AREAS OR IN STRUCTURAL MEMBERS WHICH WERE NOT ACCESSIBLE FOR VISUAL INSPECTION AS OF THE DATE OF THIS GRAPH.

THE ABOVE GRAPH, AND THE AREAS CONTAINING VISIBLE ACTIVITY OR DAMAGE, HAVE BEEN DESCRIBED TO ME, AND ARE AFFIRMED BY ME AS OWNER OR AGENT OF THE ABOVE PROPERTY. I ALSO AFFIRM THAT I UNDERSTAND THAT TERMINIX IS NOT LIABLE FOR HIDDEN DAMAGE INACCESSIBLE TO THE INSPECTOR.

DATE: _____ BY: _____

FORM #33021 REV 1/90
© 1987 The Terminix International Company L.P.

IN THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA

Case No. CV-91-796

G. MICHAEL DOBSON and WANDA C. DOBSON,
Plaintiffs,

VS.

THE TERMINIX INTERNATIONAL COMPANY, L.P.,
TERMINIX SERVICE, STEVEN C. GWIN, and JAN A. GWIN,
Defendants.

COMPLAINT

[Filed Oct. 15, 1991]

COUNT ONE

Come now the Plaintiffs in the above styled cause and claim damages of the Defendants and as grounds therefor would show unto the Court as follows:

1. That on or about May 10, 1991, the Plaintiffs did purchase from the Defendants, Steven C. Gwin and Jan A. Gwin (hereinafter referred to as "Gwin"), a residential dwelling house located at 114 Fels Avenue in the City of Fairhope, Baldwin County, Alabama.

2. That prior to said date, the Defendants, Gwin, either acting personally or through their agent, Frankie Evans, represented to the Plaintiffs that any termite damage suffered by said dwelling house consisted of "old" damage and that the same had been repaired, all termites treated and that there existed no live infestation of termites in said dwelling; that a new roof had been erected

on said dwelling and that the same did not leak and was in good condition; and that the electrical wiring in said dwelling was in good condition.

3. That prior to said date, the Defendants, Terminix International Company, L.P. and Terminix Service (hereinafter referred to as "Terminix"), undertook to inspect said dwelling for the purpose of determining the existence of any wood destroying insects and that said Defendants represented to the Plaintiffs that there was no visible evidence of infestation from wood destroying insects.

4. That all of said representations were false in that said dwelling was infested throughout with live termites, of which there was visible evidence; that the roof was damaged, leaking and had not been replaced; and that the electrical wiring was defective and in violation of local and national electrical codes.

5. That said misrepresentations were of material facts and were made by the Defendants, either willfully to deceive; recklessly without knowledge; or by mistake and innocently, but, in any event, constitute legal fraud as that term is defined by *Code of Alabama*, Section 6-5-101, et seq. (1975).

6. That the Plaintiffs relied on said misrepresentations to their detriment in that they purchased said dwelling house believing the truth of the representations made to them.

7. That as a proximate result of said misrepresentations, the Plaintiffs have been damaged in that they have been required to retain substitute housing while repairs have been made to the dwelling which they purchased; that portions of their dwelling remain damaged from said infestation; that they have been caused to suffer mental anguish; and that their dwelling has been rendered less valuable because of the fear of future termite infestations.

WHEREFORE, Plaintiffs demand judgment against the Defendants for such damages to which they might be

entitled, in excess of the jurisdiction of this Court, together with interest and costs.

COUNT TWO

Come now the Plaintiffs in the above styled cause and claim damages of the Defendants, Terminix International Company, L.P. and Terminix Service, and as grounds therefor would show unto the Court as follows:

1. Plaintiffs adopt and incorporate herein paragraphs one and three of Count One of the Complaint.

2. That in the event the Defendants, Terminix, did not have actual knowledge of the existence of wood destroying insects in said dwelling, then in such event the inspection undertaken by the Defendants, Terminix, was done in a negligent or wanton manner.

3. That as a proximate result of said negligence or wantonness of the Defendants, Terminix, the Plaintiffs have been damaged in that they have been required to retain substitute housing while repairs have been made to the dwelling which they purchased; that portions of their dwelling remain damaged from said infestation; they have been caused to suffer mental anguish; and the dwelling which they purchased has been rendered less valuable because of the fear of future termite infestation.

WHEREFORE, Plaintiffs demand judgment against the Defendants, Terminix, for such damages to which they might be entitled, in excess of the jurisdiction of this Court, together with interest and costs.

COUNT THREE

Come now the Plaintiffs in the above styled cause and claim damages of the Defendants, Gwin, and as grounds therefor would show unto the Court as follows:

1. Plaintiffs herein adopt and reallege the allegations of paragraph one of Count One of the Complaint.

2. That prior to said date, the said dwelling was infested throughout with live termites; the roof was dam-

aged, leaking and had not been replaced; and the electrical wiring was defective and in violation of local and national electrical codes.

3. That the Plaintiffs were not aware of said conditions prior to the purchase of said dwelling because the same were fraudulently concealed from them by the Defendants, Gwin.

4. That as a proximate cause of said fraudulent concealment, the Plaintiffs were prevented from discovering the existence of said material facts and were thereby induced to purchase said dwelling to their detriment and as a proximate result thereof have been damaged in that they have been required to retain substitute housing while repairs have been made to the dwelling which they purchased; that portions of their dwelling remain damaged from said infestation; they have been caused to suffer mental anguish; and their dwelling has been rendered less valuable because of the fear of future termite infestations.

WHEREFORE, Plaintiffs demand judgment against Defendants, Gwin, for such damages to which they might be entitled, in excess of the jurisdiction of this Court, together with interest and costs.

/s/ Allan R. Chason
ALLAN R. CHASON
Attorney for Plaintiffs

Of Counsel:

CHASON & CHASON, P.C.
P. O. Box 100
Bay Minette, Alabama 36507

Plaintiffs respectfully request a trial by jury of all issues stated in the foregoing Complaint.

/s/ Allan R. Chason
ALLAN R. CHASON
Attorney for Plaintiffs

[Service by Certified Mail Omitted in Printing]

IN THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA

[Title Omitted in Printing]

ANSWER OF DEFENDANT TERMINIX INTERNATIONAL COMPANY, L.P. TO PLAINTIFFS' COMPLAINT

[Filed Nov. 26, 1991]

COMES NOW, Terminix International Company, L.P. (hereinafter referred to as "Terminix International"), a Defendant in the above-styled action, and answers the numbered paragraphs of Plaintiffs' complaint as follows:

COUNT ONE

1. Defendant Terminix International is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1 through 2 of Count One of Plaintiffs' complaint and thus, denies the same and demands strict proof thereof.

2. Defendant Terminix International denies the allegations of paragraphs 3 through 7 of Count One of Plaintiffs' complaint and demands strict proof thereof.

COUNT TWO

3. Answering paragraph 1 of Count Two of Plaintiffs' complaint, Defendant Terminix International incorporates by reference paragraphs 1 and 2 of this answer as if the same had been set forth in full herein.

4. Defendant Terminix International denies the allegations of paragraphs 2 through 3 of Count Two of Plaintiffs' complaint and demands strict proof thereof.

COUNT THREE

5. The averments contained in paragraphs 1 through 4 of Count Three of Plaintiffs' complaint need not be admitted or denied by Defendant Terminix International, since they relate solely to other Defendants, but inasmuch as said allegations can be construed to require a response from Defendant Terminix International, Defendant Terminix International is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1 through 4 of Count Three of Plaintiffs' complaint, thus, denies the same and demands strict proof thereof.

6. Any allegation contained in Plaintiffs' complaint which is not hereinbefore admitted is hereby specifically denied.

7. Defendant Terminix International denies that Plaintiffs are entitled to any judgment or relief as requested in their complaint and demands strict proof thereof.

FIRST AFFIRMATIVE DEFENSE

Said complaint and each cause of action contained therein, jointly and separately, fails to state a claim against Defendant Terminix International upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

As a second, separate and affirmative defense, Defendant Terminix International asserts that there were one or more sufficient intervening causes which proximately contributed to the damage of which Plaintiffs are complaining; hence, Plaintiffs ought not recover from Defendant Terminix International.

THIRD AFFIRMATIVE DEFENSE

As a third, separate and affirmative defense, Defendant Terminix International asserts that Plaintiffs should not

recover from Defendant Terminix International because Plaintiffs or one or more persons (other than Defendant Terminix International) are guilty of negligence, or other willful, wanton or reckless conduct, which proximately contributed to the damages alleged in Plaintiffs' complaint.

FOURTH AFFIRMATIVE DEFENSE

As a fourth, separate and affirmative defense, Defendant Terminix International asserts that there is no duty owing from said Defendant to Plaintiffs sufficient to support a claim for negligence and/or wantonness.

FIFTH AFFIRMATIVE DEFENSE

As a fifth, separate and affirmative defense, Defendant Terminix International asserts that Plaintiffs have failed to allege with sufficient particularity, the facts constituting a cause of action for fraud.

SIXTH AFFIRMATIVE DEFENSE

As a sixth, separate and affirmative defense, Defendant Terminix International asserts that there was no causal relationship between any alleged breach of a duty by Defendant Terminix International and the damages complained of by Plaintiffs.

SEVENTH AFFIRMATIVE DEFENSE

As a seventh, separate and affirmative defense, Defendant Terminix International asserts that Plaintiffs seek punitive damages in violation of the Excess Fines Clause of the Eighth Amendment of the Constitution of the United States.

EIGHTH AFFIRMATIVE DEFENSE

As a eighth, separate and affirmative defense, Defendant Terminix International asserts that Plaintiffs seek punitive damages in violation of the Due Process Clause

of the Fourteenth Amendment of the Constitution of the United States in one or more of the following respects:

1. The punitive damage claims are vastly disproportionate to the actual damages.
2. The award of punitive damages would constitute an arbitrary and capricious taking of the property of Defendant Terminix International, a taking which is unjustified by any rational state purpose.
3. The award of punitive damages with wholly standardless discretion is inconsistent with due process.

NINTH AFFIRMATIVE DEFENSE

As a ninth, separate and affirmative defense, Defendant Terminix International asserts that the award of punitive damages claimed by Plaintiffs would violate the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, separately, of the Constitution of the United States and Article I, Sections 1, 6, 15 and 22 of the Constitution of Alabama, on each of the following separate and several grounds:

1. The procedures may result in the award of joint and several judgments against multiple defendants for different alleged acts of wrongdoing.
2. The procedures fail to provide means for awarding separate judgments against alleged joint tort feasors.
3. The procedures fail to provide a limit on the amount of the award against Defendant Terminix International.
4. The procedures fail to provide specific standards for the award of punitive damages.
5. The procedures fail to provide specific standards for the amount of the award of punitive damages.

6. The procedures permit the award of punitive damages upon satisfaction of a standard of proof less than that applicable to the imposition of criminal sanctions.
7. The procedures permit multiple awards of punitive damage for the same alleged act.
8. The procedures fail to provide a clear consistent appellate standard of review for an award of punitive damages.
9. The procedure may permit the admission of evidence relative to punitive damages in the same proceeding during which liability is determined.
10. The standards of conduct upon which punitive damages are sought are vague.
11. An award of punitive damages as claimed would violate Defendant Terminix International's right to the equal protection of the laws.
12. The award of punitive or extra-contractual damages on the basis of vicarious liability for the conduct of other violates the Fifth, Eighth and Fourteenth Amendments of the United States Constitution as well as the Alabama Constitutional provisions set forth above.
13. It is improper and unconstitutional to assess punitive damages based on derivative or attributed liability, such as respondeat superior liability.

TENTH AFFIRMATIVE DEFENSE

As a tenth, separate and affirmative defense, Defendant Terminix International asserts that the imposition of punitive damages in this case would violate the equal protection clause of the Fifth and Fourteenth Amendments to the United States Constitution, separately, and would deprive Defendant Terminix International of the right to equal protection under the law as provided in

Article I, Sections 1, 6 and 22 of the Alabama Constitution of 1901 because, among other reasons, criminal defendants are placed in a position of distinct advantage over civil defendants of comparable culpability due to the disparity in punitive treatment for similar conduct and because the absence of sufficiently specific and objective standards for the imposition of punitive damages fails to ensure equality of treatment between and among similarly situated civil defendants in the same or in different cases.

ELEVENTH AFFIRMATIVE DEFENSE

As an eleventh, separate and affirmative defense, Defendant Terminix International asserts that present Alabama procedures pursuant to which punitive damages are awarded permit the imposition of punitive damages in excess of the maximum criminal fine for the same or similar conduct, which thereby infringes upon the due process and equal protection provisions of the Alabama and United States Constitutions.

TWELFTH AFFIRMATIVE DEFENSE

As a twelfth, separate and affirmative defense, Defendant Terminix International asserts that the procedures pursuant to which punitive damages are awarded permit the imposition of an excessive fine in violation of the Eighth Amendment of the United States Constitution and Article I, Section 15 of the Alabama Constitution.

THIRTEENTH AFFIRMATIVE DEFENSE

As a thirteenth, separate and affirmative defense, Defendant Terminix International asserts that the award of punitive damages against Defendant Terminix International in this action would violate the prohibition against laws that impair the obligations of contracts in violation of Article I, Section 22 of the Constitution of Alabama.

FOURTEENTH AFFIRMATIVE DEFENSE

As a fourteenth, separate and affirmative defense, Defendant Terminix International asserts that Plaintiffs' demand for punitive damages violates the self-incrimination clauses of the Fifth Amendment of the United States Constitution and of Article I, Section 6 of the Alabama Constitution in that the damages claimed are penal in nature while Defendant Terminix International is required to disclose documents and/or other evidence without the safeguards against self-incrimination set out in the Fifth Amendment.

FIFTEENTH AFFIRMATIVE DEFENSE

As a fifteenth, separate and affirmative defense, Defendant Terminix International asserts that Plaintiffs' demand for punitive damages violates the Sixth Amendment of the United States Constitution in that the Plaintiffs' claim for punitive damages is a claim that is penal in nature, entitling Defendant Terminix International to the same procedural safeguards accorded to a criminal defendant under the Sixth Amendment.

SIXTEENTH AFFIRMATIVE DEFENSE

As a sixteenth, separate and affirmative defense, Defendant Terminix International asserts that Plaintiffs' demand for punitive damages violates the Fifth Amendment of the United States Constitution and violates Article I, Section 6 of the Alabama Constitution in that no person shall be deprived of life, liberty or property except by due process of law and the punitive damages claimed are vague and not rationally related to any legitimate government interests.

SEVENTEENTH AFFIRMATIVE DEFENSE

As a seventeenth, separate and affirmative defense, Defendant Terminix International asserts that Plaintiffs' complaint is due to be dismissed as to said Defendant due to insufficiency of service of process.

/s/ Joseph P. Jones, Jr.
JOSEPH P. JONES, JR.
T. JULIAN MOTES
Attorneys for Defendant
Terminix International
Company, L.P.

Of Counsel:

SIROTE & PERMUTT, P.C.
One St. Louis Centre, Suite 1000
Post Office Drawer 2025
Mobile, Alabama 36652
(205) 432-1671

[Certificate of Service Omitted in Printing]

IN THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA

(Title Omitted in Printing)

ANSWER OF DEFENDANT ALLIED-BRUCE TERMINIX COMPANIES, INC., D/B/A TERMINIX SERVICE TO PLAINTIFFS' COMPLAINT

[Filed Nov. 26, 1991]

COMES NOW, Allied-Bruce Terminix Companies, Inc., d/b/a Terminix Service (hereinafter referred to as "Terminix Service"), a Defendant in the above-styled action, and answers the numbered paragraphs of Plaintiffs' complaint as follows:

COUNT ONE

1. Defendant Terminix Service is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1 through 2 of Count One of Plaintiffs' complaint and thus, denies the same and demands strict proof thereof.

2. Answering paragraph 3 of Count One of Plaintiffs' complaint, Defendant Terminix Service admits that said Defendant performed a visual inspection of the readily accessible areas of the property involved in this suit on behalf of Defendants, Steven C. Gwin and Jan A. Gwin, and that Defendant Terminix Service submitted a written report on the visual inspection providing, among other things, no visible evidence of infestation from wood destroying insects was observed and visible damage due to subterranean termites has been observed in areas marked on an attached graph. Except as hereinabove already admitted, Defendant Terminix Service denies each

and every remaining allegation contained in paragraph 3 of Count One of Plaintiffs' complaint and demands strict proof thereof.

3. Defendant Terminix Service denies the allegations of paragraphs 4 through 7 of Count One of Plaintiffs' complaint and demands strict proof thereof.

COUNT TWO

4. Answering paragraph 1 of Count Two of Plaintiffs' complaint, Defendant Terminix Service incorporates by reference paragraphs 1 and 2 of this answer as if the same had been set forth in full herein.

5. Answering paragraph 2 of Count Two of Plaintiffs' complaint, Defendant Terminix Service admits that said Defendant during a visual inspection performed on behalf of Defendants, Steven C. Gwin and Jan A. Gwin, of the readily accessible areas of the property involved in this suit observed no visible evidence of infestation from wood destroying insects, but did observe and report visible damage due to subterranean termites. Except as hereinabove already admitted, Defendant Terminix Service denies each and every remaining allegation contained in paragraph 2 of Count Two of Plaintiffs' complaint and demands strict proof thereof.

6. Defendant Terminix Service denies the allegations of paragraph 3 of Count Two of Plaintiffs' complaint and demands strict proof thereof.

COUNT THREE

7. The averments contained in paragraphs 1 through 4 of Count Three of Plaintiffs' complaint need not be admitted or denied by Defendant Terminix Service, since they relate solely to other Defendants, but inasmuch as said allegations can be construed to require a response from Defendant Terminix Service, Defendant Terminix Service is without knowledge or information sufficient to

form a belief as to the truth of the allegations contained in paragraphs 1 through 4 of Count Three of Plaintiffs' complaint, thus, denies the same and demands strict proof thereof.

8. Any allegation contained in Plaintiffs' complaint which is not hereinbefore admitted is hereby specifically denied.

9. Defendant Terminix Service denies that Plaintiffs are entitled to any judgment or relief as requested in their complaint and demands strict proof thereof.

FIRST AFFIRMATIVE DEFENSE

Said complaint and each cause of action contained therein, jointly and separately, fails to state a claim against Defendant Terminix Service upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

As a second, separate and affirmative defense, Defendant Terminix Service asserts that there were one or more sufficient intervening causes which proximately contributed to the damage of which Plaintiffs are complaining; hence, Plaintiffs ought not recover from Defendant Terminix Service.

THIRD AFFIRMATIVE DEFENSE

As a third, separate and affirmative defense, Defendant Terminix Service asserts that Plaintiffs should not recover from Defendant Terminix Service because Plaintiffs or one or more persons (other than Defendant Terminix Service) are guilty of negligence, or other willful, wanton or reckless conduct, which proximately contributed to the damages alleged in Plaintiffs' complaint.

FOURTH AFFIRMATIVE DEFENSE

As a fourth, separate and affirmative defense, Defendant Terminix Service asserts that there is no duty owing from said Defendant to Plaintiffs sufficient to support a claim for negligence and/or wantonness.

FIFTH AFFIRMATIVE DEFENSE

As a fifth, separate and affirmative defense, Defendant Terminix Service asserts that Plaintiffs have failed to allege with sufficient particularity, the facts constituting a cause of action for fraud.

SIXTH AFFIRMATIVE DEFENSE

As a sixth, separate and affirmative defense, Defendant Terminix Service asserts that there was no causal relationship between any alleged breach of a duty by Defendant Terminix Service and the damages complained of by Plaintiffs.

SEVENTH AFFIRMATIVE DEFENSE

As a seventh, separate and affirmative defense, Defendant Terminix Service asserts that Plaintiffs seek punitive damages in violation of the Excess Fines Clause of the Eighth Amendment of the Constitution of the United States.

EIGHTH AFFIRMATIVE DEFENSE

As a eighth, separate and affirmative defense, Defendant Terminix Service asserts that Plaintiffs seek punitive damages in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States in one or more of the following respects:

1. The punitive damage claims are vastly disproportionate to the actual damages.
2. The award of punitive damages would constitute an arbitrary and capricious taking of the property of Defendant Terminix Service, a taking which is unjustified by any rational state purpose.
3. The award of punitive damages with wholly standardless discretion is inconsistent with due process.

NINTH AFFIRMATIVE DEFENSE

As a ninth, separate and affirmative defense, Defendant Terminix Service asserts that the award of punitive damages claimed by Plaintiffs would violate the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, separately, of the Constitution of the United States and Article I, Sections 1, 6, 15 and 22 of the Constitution of Alabama, on each of the following separate and several grounds:

1. The procedures may result in the award of joint and several judgments against multiple defendants for different alleged acts of wrongdoing.
2. The procedures fail to provide means for awarding separate judgments against alleged joint tort feasors.
3. The procedures fail to provide a limit on the amount of the award against Defendant Terminix Service.
4. The procedures fail to provide specific standards for the award of punitive damages.
5. The procedures fail to provide specific standards for the amount of the award of punitive damages.
6. The procedures permit the award of punitive damages upon satisfaction of a standard of proof less than that applicable to the imposition of criminal sanctions.
7. The procedures permit multiple awards of punitive damage for the same alleged act.

8. The procedures fail to provide a clear consistent appellate standard of review for an award of punitive damages.

9. The procedure may permit the admission of evidence relative to punitive damages in the same proceeding during which liability is determined.

10. The standards of conduct upon which punitive damages are sought are vague.

11. An award of punitive damages as claimed would violate Defendant Terminix Service's right to the equal protection of the laws.

12. The award of punitive or extra-contractual damages on the basis of vicarious liability for the conduct of other violates the Fifth, Eighth and Fourteenth Amendments of the United States Constitution as well as the Alabama Constitutional provisions set forth above.

13. It is improper and unconstitutional to assess punitive damages based on derivative or attributed liability, such as respondeat superior liability.

TENTH AFFIRMATIVE DEFENSE

As a tenth, separate and affirmative defense, Defendant Terminix Service asserts that the imposition of punitive damages in this case would violate the equal protection clause of the Fifth and Fourteenth Amendments to the United States Constitution, separately, and would deprive Defendant Terminix Service of the right to equal protection under the law as provided in Article I, Sections 1, 6 and 22 of the Alabama Constitution of 1901 because, among other reasons, criminal defendants are placed in a position of distinct advantage over civil defendants of comparable culpability due to the disparity in punitive treatment for similar conduct and because the absence of sufficiently specific and objective standards for the imposition of punitive damages fails to ensure equality of

treatment between and among similarly situated civil defendants in the same or in different cases.

ELEVENTH AFFIRMATIVE DEFENSE

As an eleventh, separate and affirmative defense, Defendant Terminix Service asserts that present Alabama procedures pursuant to which punitive damages are awarded permit the imposition of punitive damages in excess of the maximum criminal fine for the same or similar conduct, which thereby infringes upon the due process and equal protection provisions of the Alabama and United States Constitutions.

TWELFTH AFFIRMATIVE DEFENSE

As a twelfth, separate and affirmative defense, Defendant Terminix Service asserts that the procedures pursuant to which punitive damages are awarded permit the imposition of an excessive fine in violation of the Eighth Amendment of the United States Constitution and Article I, Section 15 of the Alabama Constitution.

THIRTEENTH AFFIRMATIVE DEFENSE

As a thirteenth, separate and affirmative defense, Defendant Terminix Service asserts that the award of punitive damages against Defendant Terminix Service in this action would violate the prohibition against laws that impair the obligations of contracts in violation of Article I, Section 22 of the Constitution of Alabama.

FOURTEENTH AFFIRMATIVE DEFENSE

As a fourteenth, separate and affirmative defense, Defendant Terminix Service asserts that Plaintiffs' demand for punitive damages violates the self-incrimination clauses of the Fifth Amendment of the United States Constitution and of Article I. Section 6 of the Alabama Constitution in that the damages claimed are penal in nature while Defendant Terminix Service is required to disclose

documents and/or other evidence without the safeguards against self-incrimination set out in the Fifth Amendment.

FIFTEENTH AFFIRMATIVE DEFENSE

As a fifteenth, separate and affirmative defense, Defendant Terminix Service asserts that Plaintiffs' demand for punitive damages violates the Sixth Amendment of the United States Constitution in that the Plaintiffs' claim for punitive damages is a claim that is penal in nature, entitling Defendant Terminix Service to the same procedural safeguards accorded to a criminal defendant under the Sixth Amendment.

SIXTEENTH AFFIRMATIVE DEFENSE

As a sixteenth, separate and affirmative defense, Defendant Terminix Service asserts that Plaintiffs' demand for punitive damages violates the Fifth Amendment of the United States Constitution and violates Article I, Section 6 of the Alabama Constitution in that no person shall be deprived of life, liberty or property except by due process of law and the punitive damages claimed are vague and not rationally related to any legitimate government interests.

/s/ T. Julian Motes
JOSEPH P. JONES, JR.
T. JULIAN MOTES
Attorneys for Defendant
Allied-Bruce Terminix
Companies, Inc., d/b/a
Terminix Service

Of Counsel:

SIROTE & PERMUTT, P.C.
One St. Louis Centre, Suite 1000
Post Office Drawer 2025
Mobile, Alabama 36652
(205) 432-1671

(Certificate of Service Omitted in Printing)

IN THE CIRCUIT COURT
FOR THE TWENTY-EIGHTH JUDICIAL CIRCUIT
OF ALABAMA
BALDWIN COUNTY

Civil Action Number CV-91-796

C. MICHAEL DOBSON and WANDA C. DOBSON,
Plaintiffs,

VS.

THE TERMINIX INTERNATIONAL COMPANY, L.P.,
TERMINIX SERVICE, STEVEN C. GWIN, and
JAN A. GWIN,
Defendants.

Civil Action Number CV-92-197

STATE FARM FIRE & CASUALTY CO.,
Plaintiff,

VS.

STEVEN C. GWIN, JAN A. GWIN, G. MICHAEL DOBSON,
and WANDA C. DOBSON,
Defendants.

The testimony of WANDA C. DOBSON, taken at the Law Offices of Sirote & Permutt, One St. Louis Centre, 1 St. Louis Street, Suite 1000, Mobile, Alabama, on the 18th day of May, 1992, commencing at approximately 10:15 o'clock, a.m.

Jubilee Grid Systems
19200 County Road33
Fairhope, Al. 36532

Billed to: Terminex
Mike Dobson
114 Fels

DESCRIPTION OF WHAT WORK WAS PERFORMED IN AREAS LISTED BELOW

LIVING ROOM:

Floor Joist - Replace
North Wall - Replace Studs, Siding, Sheetrock & Trim
West Wall - Replace Studs, Siding, Sheetrock & Trim
Ceiling - Replace Sheetrock
Roof - Replace Rafters, Plywood & Shingles

BAY ROOM:

Floor Joist - Replace
North Wall - Replace Studs, Siding, Sheetrock & Trim
East Wall - Replace Studs, Siding, Sheetrock & Trim
Ceiling - Replace Ceiling Joist, Sheetrock

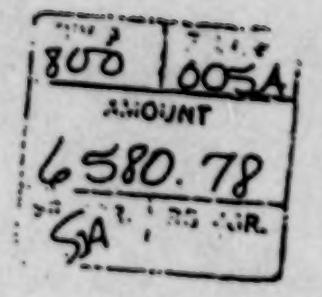
BREAKFAST ROOM:

South, East and West Wall Repaired with Sheetrock

GARAGE & APARTMENT:

South Wall - Replace Studs, Paneling, Sheetrock & Trim
Roof - Replace Rafters, Plywood & Shingles
Ceiling - Replace Sheetrock

Cost of Materials-
5,180.78
Labor-
5,900.00
Total-
11,080.78





DEFENDANT'S EXHIBIT
14

IN THE CIRCUIT COURT
FOR THE TWENTY-EIGHTH JUDICIAL CIRCUIT
OF ALABAMA
BALDWIN COUNTY

(Title Omitted in Printing)

The testimony of G. MICHAEL DOBSON, taken at the Law Offices of Sirote & Permutt, One St. Louis Centre, 1 St. Louis Street, Suite 1000, Mobile, Alabama, on the 19th day of May, 1992, commencing at approximately 8:35 o'clock, a.m.

* * * *

[907] Q Now, you've identified there was basically four phases of the repairs. Can you identify the other three phases for me?

A Yeah, I'll try do to do that and I'll try to do it—if I can flip through this and refresh my memory?

Q Sure. No problem.

A The phase one or what I refer to as phase one, for lack of a better term, included the inside repairs to the bay area, and maybe if I looked on a graph it would help more than looking at this.

Q You're looking at the second page of Defendant's Exhibit 6?

A That's correct.

Q All right.

A And at that point the sheetrock was replaced in this breakfast area.

Q Would that be the only thing done in phase one, as you understood it?

A No. Phase one also included this work done in the photographs that are like 33-A, B and C and many, many others.

Q Okay.

[908] A Where the entire portion of the house, this southwest corner, the entire north side of the house, this (Indicating) west portion of the sunroom, I think we called it yesterday, that was in phase one.

Q Okay. And this conversation that—

A But phase one also continues.

Q Okay. I'm sorry. Go ahead and finish phase one for me.

A Okay. At the same time that that was going on, the first weekend we were in there doing work, after this stuff was revealed to Sonny, I believe he came out on a Friday afternoon, and that's where Wanda and I's testimony differs a little bit. I remember that he came out on a Friday or I think it was a Friday and said he would have crews out after the Memorial Day weekend, as I recall it.

In the meantime I continued to try to get the garage apartment ready because, one, I was going to move my office in there and, two, we were going to utilize it to sleep in and try to get some of this other stuff in shape in a more reasonable manner.

So, we worked on this. I had my nephew over. He's on the ledgers that you had. That's Brett Smith. And we were readying the apartment to get it prepared. We [909] painted walls, we stripped floors, we sanded, we did all those sorts of things and I was reworking the windows—they had old windows in the house and I was reworking those. Some of the ropes had broken on them. And in the process of cleaning up, I discovered some areas of problems in the window in that garage apartment.

So by the time Sonny brought his crew out, there were more problems that had occurred. So, all of this stuff started going on and that was in phase one.

Q Okay. Now, that is all of phase one?

A No.

Q Okay. Go ahead with phase one.

A That—they started—Sonny came and viewed it, the upstairs portion of the garage apartment, underneath

the south wall by the windows there. He pulled the boards back because I discovered it with a vacuum cleaner in a window area. So he was there, pulled the boards back, looked at it for awhile, found a termite or some termites in it and said, yeah, this is another problem.

And I said, well, from what y'all have told me up to now, don't these guys come from the ground? Yeah. I said, well, doesn't it make sense that we go downstairs and see where this started from.

[910] So we went down on the south side of the garage and started pulling back—they had that side of the garage paneled, I don't know who paneled it, if it was the Gwins or people that owned it prior to them or whatever, but anyway, that garage had paneling in it. When they pulled the paneling back, they discovered significant damage to all the plating and the structures and whatnot in there.

Q Okay.

A So that was in phase one and it's probably all that was in phase one, I think.

Q Now we've covered phase one, right?

A I think.

Q Okay. Now, the conversation that you—that Tony Brown told you he heard John Buck say those statements that you identified for me, did that occur after phase one, during phase one or when did it occur?

A It would have had to have occurred after phase one.

Q Okay. Now, let's go to phase two.

There is a phase two, right?

A Well, I think there is, but there's a lot of phases and they really all kind of intermingled, but if I can—

* * * *

[918] Q Okay.

A —as I recall.

Q Now, phase two you've identified was the walls or basically—was it the rest of the walls in the garage area?

A It's every wall, every wall in the garage, the lower portion of the garage.

Q Okay.

A The lower level other than the south wall, which had previously been repaired.

Q Okay. Now, was that phase two or was there any other part of phase two that you remember?

A I believe that would probably suffice as what I referred to as phase two.

Q Okay.

A I think.

Q Okay. Now, let's go to—was there a phase three of repairs?

A Yeah.

Q Okay. Let's go to that then.

A Okay.

* * * *

[958] A That's correct, and then we started doing the—

Q And then you started moving in and then you started—you found some more damage over here which started phase two?

A As best I recall it as this point in time.

Q Do you remember any specific discussions other than what you've told me with Craig Jernigan or Sonny Adkison or any representative of Terminix concerning phase two work?

A Phase two work, as best I recall, I don't think Sonny came out personally to look at it. I made Jernigan aware of it. He notified them and I think that the person that came out and viewed it with Jernigan was John Buck. Now, I may be mistaken and I didn't have direct conversations with them.

I pointed out the work—I mean, the problems and they subsequently decided that it was their problem and gave Jernigan the go ahead to make whatever repairs were necessary.

Q Okay. That's what you remember on phase two discussions?

A As I recall, yes.

Q Okay. Now, we haven't yet identified phase [959] three, but let's do that now.

A I'm going to try to do that now and it may comingle with phase two somewhat, but I think—

Q Fine. Do the best you can.

A —the next thing that happened or it may have been in reverse or inverse order, but I don't think it is. I think phase three would be they peeled back the roof on the west side of the garage apartment, the shingle material and all that sort of thing.

Q Uh-huh.

A And that was done at my request because I had seen the extensive problems that had occurred to the roof area of the main house during phase one and I had also seen the problems on that south wall and I wasn't comfortable that we had found the problem. So—

Q Okay.

A To my recollection, that's what I call phase three. And phase three—

Q Was repairing the roof area on the garage?

A Phase three consisted of tearing off the west side of the roof of the garage, replacing every rafter, all the decking material and shingling it, yes.

Q And that was at Terminix' expense?

[960] A Yes.

Q Okay. Now, you've said a phase four?

A Uh-huh.

Q Now on phase three you understood the only work was to the garage area; is that right? There wasn't any on the main house?

A The best of my recollection, it was confined to the house—I mean, to the garage apartment.

Q What about discussions on the phase three work? You told me that you asked them and I assume when you say them—is that Craig Jernigan? Asked him to pull the roof back to see if there was damage?

A Craig Jernigan and his crew, yes.

Q And they pulled it back and there was damage?

A Yes.

Q And that was subsequently approved to be repaired by Terminix?

A That's correct.

Q Is that basically what you remember about conversations on phase three?

A Basically what I remember and Sonny, to my knowledge, did not even come out to talk about that. He relied on Jernigan's conversations.

[961] Q Okay. Phase four. Was there a phase four?

A Absolutely.

Q All right. What was phase four?

A Phase four was the problem that we were alluding to earlier along the—well—

Q Now, wait a minute. Phase two—and I'm sorry. I want to go back just a second before we go to phase four.

Phase two would have been starting around August of '91. Do you know when it finished up?

A They were able to do that work fairly rapidly and it was probably—that portion of it was probably completed in August.

Q Okay. So first of September phase two would have been completed?

A Right.

Q What about phase three; would it have started right after phase two?

A I'm having flashbacks right now and we're calling phase two and phase three are probably the same phase now as—

Q Okay.

A As I'm identifying my four phases again, those were all in and about the same period of time.

[962] Q So, those two could have been one and the same and all finished up in August?

A Probably so, as I recall, and, again, we can look at the records and figure out exactly when that was, but

as I reflect back on it, that was all nuked and done about —on or about the same time frame.

Q Okay. So now we're up to September of '91, right?

A Yeah, that was done in August because in August is when phase three started.

Q And finished up in August?

A I don't recall when phase three was finished up.

Q What about—

A Again, I've gone back and corrected what I told you before.

Q Right.

A This was all phase two, this garage apartment.

Q Phase two and three that you told me about really were combined into one phase?

A Was phase two.

* * * *

IN THE CIRCUIT COURT
FOR THE TWENTY-EIGHTH JUDICIAL CIRCUIT
OF ALABAMA
BALDWIN COUNTY

(Title Omitted in Printing)

The testimony of STEVEN CREW GWIN taken at the law offices of Messrs. Reams, Philips, Brooks, Schell, Gatson & Hudson, P.C., 3662 Dauphin Street, Mobile, Alabama on the 4th day of June, 1992, commencing at approximately 9:00 o'clock, a.m.

* * * *

[1340] Q Do you recall as your wife testified yesterday that you took possession of the house at 114 Fels Avenue in Fairhope somewhere around 1984?

A Right.

Q And then you made a decision to place it on the market for sale in 1991 and on February 9th of '91 entered into a sales authority with Irvine Realty?

A Yes.

Q Your wife told us, I believe, that there were four incidents between the time that you took possession in '84 and you put it on market in '91 wherein termites were seen, visably seen around the house.

Do you agree with that?

A Right.

Q Do you remember at the time that you listed the home for sale on February the 9th of 1991 that you had to complete something entitled a seller's disclosure statement?

A Yes.

* * * *

[1346] Q When the house was appraised, was there any mention made of termite damage at that time?

A I do not know if anyone made any mention of termite damage. I do not remember seeing the appraisal.

Q What conversations if any had you had with Terminex personnel, between September the 4th of '84 when you bought the house and May the 10th of '91 when you sold it, about termites?

A The only time I remember talking to Terminex was in '87 when I had found termites on the roof and found out that my bond had expired with Delta.

And, instead of trying to renew another bond with Delta, I decided to go with a national company like Terminex.

And I called Terminex and asked them to come out and see about setting the house, putting the house under bond. A gentleman came out—I don't remember who it was—and I met him at the house and told him where I had found the termites on the roof and pointed that area to him and showed him what I thought was termite damage on the side, on that northwest corner.

* * * *

IN THE CIRCUIT COURT
FOR THE TWENTY-EIGHTH JUDICIAL CIRCUIT
OF ALABAMA
BALDWIN COUNTY

(Title Omitted in Printing)

The testimony of GEORGE WALTER ADKISON taken at the law offices of Messrs. Reams, Philips, Brooks, Schell, Gaston & Hudson, P.C., 3662 Dauphin Street, Mobile, Alabama on the 4th day of June, 1992, commencing at approximately 1:00 o'clock, p.m.

* * * *

[1500] A There's just no way of knowing. We don't solicit them. They're called in to us and I have no way of telling how many will be called in.

Q During the last thirty days, what would you say you have done?

A I believe between twenty and thirty.

Q Is that a little busier than usual?

A There again, that's not something I can tell you. It's just according to the housing market at that time.

Q I'll leave you alone about that. Do you charge for giving these clearance letters?

A Yes, sir, we do.

Q What is the charge?

A Sixty dollars.

Q Do you only give them on property that you have under a termite protection plan?

A No, sir, we don't.

Q I don't understand that. Does that mean you will do it on any property?

A Yes, sir.

Q Is the charge any different if you have the property under a termite protection plan?

[1501] A At one time we didn't charge for clearance letters if they were under protection. But it is the same now.

Q When did that change take place?

A I'm not sure. It has been within the last six to eight months.

Q I asked you in the interrogatories if y'all had a termite bond on this property and the answer was no, on this 114 Fels Avenue.

A We have a termite protection on it.

Q Well, do you take—is it the word bond you take exception to?

A Yes, sir.

Q You don't call it a bond?

A No, sir.

Q Well, like Interrogatory Number 3: Please state whether you now have in force or have ever had in force a termite bond covering the subject property.

Answer: No.

If I had asked you if you had a termite protection plan covering the subject property, would your answer have been yes?

A Yes.

* * * *

IN THE CIRCUIT COURT FOR THE
TWENTY-EIGHTH JUDICIAL CIRCUIT OF
ALABAMA, BALDWIN COUNTY

(Title Omitted in Printing)

The testimony of JOHN WAYNE BUCK taken at the law offices of Messrs. Reams, Philips, Brooks, Schell, Gaston & Hudson, P.C., 3662 Dauphin Street, Mobile, Alabama on the 4th day of June, 1992, commencing at approximately 4:30 o'clock, p.m.

* * * *

[1613] JOHN WAYNE BUCK,

the witness, after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CHASON:

Q Tell us your name.
A John Wayne Buck.
Q Where are you from, John?
A Bay Minette.
Q How long have you been working at Terminex?
A Two years.
Q Do you live in Bay Minette now?
A Yes, sir.
Q Where do you live?
A End of Hand Avenue.
Q You went to work for them when?
A Sometime the end of May, '90.

Q Do you know the Dobsons?
A Yes. I know Mr. Dobson.
Q Are you familiar with their property in Fairhope?
A Uh-huh, sure.
[1614] Q When was the first time you ever went to that place?
A It was sometime early spring of '91. I don't recall the exact date.
Q What was the occasion for you going there?
A She had called in with some—well, not the Dobsons—but the Gwins had called in with some possible termite activity out there.
Q Did you talk to Mrs. Gwin?
A Well, I was there. I don't know if you call me the person in charge or not. I was there.
Q You got sent over there to check it out?
A Right.
Q Tell me what you found when you got there.
A I think Sonny was with me that time. I'm not sure. I think he was with me. I myself don't remember finding anything. That's just me. I don't know.
Q Was that when they reported the swarmer?
A Right, uh-huh.
Q Do you remember what you did when you got there?
A On that occasion seems like we checked the outside. I think I crawled underneath. If it wasn't that day, it was another day that I crawled underneath. [1615] I can't say for sure.
Q How many times did you go out there total?
A From what?
Q Ever have you been out there.
A Five or six maybe. Something like that.
Q Do you remember how many of them were when the Gwins were there and how many of them were after the Dobsons bought it?
A Maybe half and half. Something like that.

Q On this swarmer call in the spring of '91, how many times did you go in connection with that?

A A couple of times. Maybe two. Something like that.

Q You look like you don't remember too much about the details?

A I'm just—I go to so many places, I don't keep up, to tell you the truth.

Q Do you remember going underneath the house?

A Yes, sir.

Q Do you think it was in connection with the swarmer call, you think you went under the house?

A Yeah, uh-huh.

Q Did you find any termite damage under the house?

[1616] A Yes, sir, uh-huh.

Q Do you remember where you found it and what you found?

A Well, there's one thing sticks out in my mind is there's a sill—I guess it would be the east part of the house—that's really the only thing I can remember about the house itself.

Q What did you see over there?

A It was just a sill that had been one time or another riddled with termites. It just had termites in it.

Q I think we have got a picture of it here.

Look at these pictures marked 89-A, B and C and 88-A, B and C and let me ask you if that's the sill you're talking about?

A I don't have any idea.

Q Does that look like what it looked like, what you saw looked like?

A Something like that. I mean, I can't say that that is sill but, I mean, something like that.

Q Could be the sill you're talking about?

A I just—do you know what corner of the house this is in? I mean, do you have that?

[1617] Q I'm told—

MR. MOTES:

If you know, answer. If you don't, give your answer.

A No.

BY MR. CHASON:

Q Well, I'm told that is the sill on the east side of the house where the termites swarmed in March of '91.

I am asking you if you can tell me yes or no if that looks like it?

A No. To me, it doesn't.

Q It does not look like it?

A To me, it doesn't.

Q What is different about it?

A I just didn't remember it being white. That looks like white there. I just don't remember that.

Q But you did see a sill on that house that was riddled with termites?

A Yes, sir.

Q Did you see any active termites in it?

A No, sir.

Q Could you tell how long it had been since they

[1618] left?

A I can't.

Q Is there a way to tell whether it's been recently damaged by termites or whether it's old?

A Well, you can—I mean, well, let me see how to put this.

When they left, it's kind of like it dries up. And when they're in there it seems like it's a little moist.

When they leave, it just seems like it all just falls kind of to pieces or something.

Q Which way was this sill?

A It was dried up. I probed it, couldn't find anything in it.

Q That was in the area underneath the house where the termites had swarmed on the outside?

A Yes, sir. It's along that whole east side, though. She had mentioned something like that.

Q Did you think that the termites that she saw swarming on the outside were coming from the area of that sill that you saw on the underneath?

A Well, I had no way of knowing. All I could do was check the sill. That's just all I know.

[1619] Q How long was that sill that you are talking about?

A Well, as far as how much damage was—how far the damage was or . . .?.

Q Well, tell me both. How long was it and how much of it was damaged?

A Well, I guess the sill would run all the way down the east side but as far as the damage I don't remember it being—I don't know. Maybe ten feet either way, something like that. That's just a guess.

MR. MOTES:

Don't guess.

BY MR. CHASON:

Q Did you look around the rest of the house?
A Yes, sir.
Q Did you see any more damage?
A Not that I can recall.
Q That's the only damage you saw?
A That's what sticks out in my head. That's it.
Q Did you tell Sonny what you had found?
A Yes.
Q Did Sonny go under the house?

A At that time, I don't know. Now, he went [1620] another time with me but at that one instance I can't tell you whether he did or not.

Q Were y'all ever able to find any live termites anywhere around the place on that occasion?

A No, sir.

Q Did you take any boards loose?

A I didn't. I think they took a board off the window. I don't remember what was back there, to tell you the truth.

Q Did y'all put out any chemical that day?

A We treated it one day. I can't tell you if it was that day for sure.

Q Was that a one day deal or do you think that took more than one day to take care of this swarmer problem and treating it?

A I don't understand the question.

Q Did you have to come back more than one time to take care of the problems with the swarmers?

A Well, we came back and did more than one treatment. I mean, we treated one side of the house and then treated another side, on separate days.

Q Did you talk to Mrs. Gwin about what you had found?

[1621] A I spoke with her.

Q What did you tell her?

A I don't recall.

Q Did you have any way of knowing whether y'all had killed the termites, the colony that that swarm came from?

A With the treatment I did?

Q Yes.

A Well, when we treat it, we like to think that they are gone but, I mean, there's no hundred percent just proof that they are gone unless you just—I guess—just actually see into the wall there itself.

Q You don't ever know for sure?

A Very seldom.

Q Whenever termites swarm that means that they are present there somewhere, doesn't it?

A In the vicinity. It could be as far as, I'll say, maybe another yard or something. I mean, just because you have swarmers at one house doesn't mean that they would have to come from that property.

Q If Mrs. Gwin saw them swarming out from underneath a window, that wouldn't indicate that they came from that house?

[1622] A I didn't see it. I'd—if I had saw it myself, I could maybe say it. But I don't know. I have seen

them, well, go through windows maybe from the outside in. I have seen that.

Q Now, when was the next time you were out there after that?

A After the first time or—I was out there several times. I mean, do you. . .

Q I mean, I'm trying to get in order every time you went out there as best you can.

A All I know is that I went out there. I can't tell you an exact date or nothing.

Q Well, tell me however you remember, what it was for or. . .

A Well, I remember we went back out there and treated that over by the fireplace on the—it would be the Bay side of the house.

Q Was that at a later time?

A It would be, yes, I guess a later time.

Q What was the next time you went?

A I guess that would have to be for the letter itself.

Q What letter?

[1623] A The clearance letter itself.

Q Do you remember that you gave a clearance letter on this house?

A Well, I remember that the inspection we did was for a clearance letter.

Q When is the last time you have seen that clearance letter?

A I couldn't tell you.

Q Have you seen it since you gave it?

A Yes, we've seen it.

Q When have you seen it?

A I saw it over at Mr. Motes' office.

Q When is that?

A A couple of weeks ago.

Q What about before that? When is the last time you saw it?

A I guess when we gave it.

Q You hadn't looked at it since you gave the letter the until you saw it a couple of weeks ago?

A Not as I can recall.

Q What do you remember about the request for that clearance letter?

A I really don't remember anything about the [1624] request. I wasn't in on the ordering of it or anything. I was there just to do it.

Q Did you do the inspection?

A Yes, sir.

Q What did you do?

A Well, just what we do on an inspection. We just check the property, go under it, probe areas.

Q Did you do that?

A Yes, sir.

Q Went all underneath the house?

A Yes, sir.

Q Did you go in the attic?

A Not at that time.

Q What time did you go in the attic?

A Mrs. Gwin took us through the house and all through the house and the garage—I guess you call it a garage apartment.

Q When was that?

A I don't—it was just sometime prior to that.

Q What else did you do on your inspection?

A Well, you just—just what we do on inspections, just check and probe and just do a visual inspection on it.

[1625] Q Did you see anything different under the house on May the 7th than you had on your first time, which I think we have agreed is March 28th?

A Not that I can recall.

Q Did you see any live termites?

A No, sir.

Q Did you talk to Mrs. Gwin about what you saw?

A I don't recall.

Q Was anybody with you when you did that inspection?

A It seems like Sonny was but. . .

Q Did he go under the house?

A Yes, sir.

Q So y'all both went under the house?

A Yes, sir.

Q Was there any reason you all both went under the house?

A Well, that's just something we do sometimes. It just makes things a little easier.

Q You split it up, he looked at half and you looked at half?

A Well, you just kind of—not necessarily that. You just—seems like two heads are better than one [1626] sometimes.

Q Were y'all particularly cautious or careful about this particular inspection since they had a good bit of trouble out there?

A I like to think we were.

Q Why don't you tell me in your own words why you were being particularly careful of this inspection?

A Well, she had had a call of possible swarmers.

Q Had you looked at her file or the file on that property?

A No, sir.

Q Were you aware that that was not the first time she had reported swarmers?

A No, sir.

Q You didn't know that?

A No, sir.

Q You had seen some damage under the house, though?

A Yes.

Q The fact that she she had reported swarmers and the fact that she had termite damage under her house, did that cause you to believe maybe there was a pretty

high chance that she had an active infestation of [1627] termites there?

A Just didn't know. I mean, I just didn't know.

Q Did you fill out the letter you see there in front of you?

A This right here?

MR. MOTES:

Terminex 2.

BY MR. CHASON:

Q Yes.

A No, sir. I think I just signed it.

Q Who filled it out?

A Well, the secretaries do the actual typing of the letters.

Q Did you draw the graph on the second page?

A Yes, sir. That's my handwriting there.

Q Is that graph accurate?

A It should be.

Q You found damage in all the spots that are shown there?

A Yes, sir.

Q Now, what was the next time you went out there?

A It's just hard to say. Maybe when the Dobsons got it. I just don't know.

[1628] Q What would be the reason for you going out there?

A If they had damage or maybe some more termites or something.

Q You don't remember particularly when or why?

A No, sir, I sure don't.

Q You get paid what, a salary and then a commission on top of that?

A Yes, sir.

Q How do they figure your commission?

A You just make units on what you do. I mean, you just have to make your—you have to make your salary. Then you make commission above your salary. So it's just you have to make everything you get.

Q How do you make it?

A Well, just whatever job you do you just get paid in a certain way for it. Everything has different—we get paid on units. Everything you do you get different units for.

* * * *

IN THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA

Case No. CV-91-796

G. MICHAEL DOBSON and WANDA C. DOBSON,
Plaintiffs,

vs.

THE TERMINIX INTERNATIONAL COMPANY, L.P., ALLIED-BRUCE TERMINIX COMPANIES, INC., d/b/a Terminix Service, STEVEN C. GWIN and JAN A. GWIN,
Defendants.

FIRST AMENDED COMPLAINT

[Filed Jun. 25, 1992]

Come now the Plaintiffs in the above styled cause on this their First Amended Complaint and in the place and stead of the Defendant referred to in the original Complaint as "Terminix Service" do substitute therefore as a party Defendant Allied-Bruce Terminix Companies, Inc., d/b/a Terminix Service.

Plaintiffs do further amend the Complaint on file in this cause to include the following:

COUNT ONE

Count One of the Complaint is amended by adding thereto the following:

8. That the Defendant, Allied-Bruce Terminix Companies, Inc., d/b/a Terminix Services, at the time and place complained of herein was acting within the line and scope of its authority either as the agent, servant, employee or alter ego of the Defendant, Terminix International Company, L.P., such that both the said Defend-

ant, Allied-Bruce Terminix Companies, Inc., d/b/a Terminix Service, and the Defendant, Terminix International Company, L.P., are liable for the said misrepresentations to the Plaintiffs referred to herein.

WHEREFORE, Plaintiffs demand judgment against the Defendants for such damages to which they might be entitled, in excess of the jurisdiction of this court, and including punitive damages, together with interest and costs.

COUNT TWO

By adding the following to Count Two:

WHEREFORE, Plaintiffs demand judgment against the Defendants for such damages to which they might be entitled in excess of the jurisdiction of this court, and including punitive damages, together with interest and costs.

COUNT THREE

By adding the following to Count Three:

WHEREFORE, Plaintiffs demand judgment against the Defendants for such damages to which they might be entitled, in excess of the jurisdiction of this court, and including punitive damages, together with interest and costs.

COUNT FOUR

Come now the Plaintiffs in the above styled cause and claim damages of the Defendants, The Terminix International Company, L.P. and Allied-Bruce Terminix Companies, Inc., and as grounds therefor would show unto the Court as follows:

1. Plaintiffs herein reallege the allegations of Paragraph One of Count One of the Complaint.

2. That at all times since August 25, 1987, the Defendants, Gwin, had in force a Termite Protection Plan issued by the Defendant, Terminix, and bearing guarantee number PR08870291-08 covering the premises located at 114 Fels Avenue, Fairhope, Alabama.

3. That under and by the terms of the contract of sale of said premises from Gwin to the Plaintiffs, the Plaintiffs were to cause said Termite Protection Plan to be transferred to the Plaintiffs along with "written evidence from a bonded and licensed termite control company that a visual inspection by them indicates the dwelling is free from infestation by wood destroying insects and damage caused by currently active infestation."

4. That on May 10, 1991, said Termite Protection Plan was transferred to the Plaintiffs and which plan the Plaintiffs have maintained in force through the present date by paying all fees and charges due thereunder.

5. That under and by the terms of said Termite Protection Plan, the said Defendants, Terminix, agreed to provide the necessary service "to protect the identified property against the attack of subterranean termites" and upon the breach thereof to "arrange for the necessary repairs" and to pay for the same.

6. That the Defendants, Terminix, have breached the terms of said Termite Protection Plan by failing to protect the identified property against the attack of subterranean termites, in that said dwelling has, since the purchase by the Plaintiffs, been infested throughout with live termites; and in that said Defendants, Terminix, did not arrange for all of the repairs rendered necessary by or pay for the same, but rather that the Plaintiffs were required to arrange for and pay for many of said repairs.

7. That as a proximate result of said breach, the Plaintiffs have suffered damages in that they have been required to retain substitute housing while repairs have been made to the dwelling which they purchased; that portions of their dwelling remain damaged from infestation; that they have been caused to suffer mental anguish;

and that their dwelling has been rendered less valuable because of the fear of future termite infestations.

WHEREFORE, Plaintiffs demand judgment against the Defendants for such damage to which they might be entitled, in excess of the jurisdiction of this court, together with interest and costs.

/s/ Allan R. Chason
ALLAN R. CHASON
Attorney for Plaintiffs

Of Counsel:
CHASON & CHASON, P.C.
P.O. Box 100
Bay Minette, Alabama 36507

Plaintiffs respectfully request a trial by jury of all issues stated in the foregoing First Amended Complaint.

/s/ Allan R. Chason
ALLAN R. CHASON
Attorney for Plaintiffs

(Certificate of Service Omitted in Printing)

IN THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA

(Title Omitted in Printing)

CROSSCLAIM

[Filed Jun. 30, 1992]

COMES NOW Steven C. and Jan A. Gwin, two of the defendants in this cause, and file this their crossclaim against the Terminex International Company LP and Allied Bruce Terminex Companies, Inc. d/b/a Terminex Service as follows:

COUNT ONE

1. On or about August 25, 1987, the crossclaim plaintiffs, Steven C. and Jan A. Gwin, entered into a contract known as a "Termite Protection Plan", Guarantee No. PR08870291-08 with the crossclaim defendants whereby the crossclaim defendants for a consideration paid by the crossclaim plaintiffs agreed to provide the necessary service to protect the crossclaim plaintiffs' dwelling against the attack of subterranean termites. A copy of the Termite Protection Plan, Guarantee No. PR08870291-08 is attached hereto and marked as Exhibit A. This contract was extended on its anniversary date for the years 1988, 1989, and 1990.

2. Based on information discovered in this case, the counterclaim defendants breached its Termite Protection Plan and extensions thereof in that subterranean termites were apparently allowed to cause damage to the structure and walls of the counterclaim plaintiffs' dwelling.

3. As a proximate result of said breach of contract, the counterclaim plaintiffs have been caused to suffer the following damages:

a. Their home was permanently damaged and made less valuable;

b. Repairs that should have been made by the plaintiffs' crossclaim defendants pursuant to the Termite Protection Plan were not made, and demand has been made on the crossclaim to effectuate and pay for said repairs;

c. They have been required to expend monies to defend a lawsuit filed by the purchasers of their home, G. Michael Dobson and Wanda C. Dobson, the plaintiffs in this lawsuit arising out of the home's infestation of subterranean termites;

d. They have suffered and continue to suffer mental pain and anguish.

WHEREFORE, crossclaim plaintiffs demand judgment against the crossclaim defendants for whatever amount the crossclaim plaintiffs may be liable to the plaintiffs, if any, and in addition such damages as the trier of fact may assess.

COUNT TWO

4. Crossclaim plaintiffs incorporate by reference paragraph 1.

5. Between August 25, 1987 and May 10, 1991, the crossclaim defendants were negligent in the manner in which they inspected the crossclaim plaintiffs' home, in the way they treated the crossclaim plaintiffs' home for subterranean termites, and in the manner in which they performed the general conditions of their Termite Protection Plan, Guarantee No. PR08870291-08.

6. As a proximate cause of said negligence, the counterclaim plaintiffs have been caused to suffer the following damages:

a. Their home was permanently damaged and made less valuable;

b. Repairs that should have been made by the crossclaim defendants pursuant to the Termite Protection Plan were not made, and demand has been made on the plaintiffs' crossclaim to effectuate and pay for said repairs;

c. They have been required to expend monies to defend a lawsuit filed by the purchasers of their home, G. Michael Dobson and Wanda C. Dobson, the plaintiffs in this lawsuit arising out of the home's infestation of subterranean termites;

d. They have suffered and continue to suffer mental pain and anguish.

WHEREFORE, crossclaim plaintiffs demand judgment against the crossclaim defendants for whatever amount the crossclaim plaintiffs may be liable to the plaintiffs, if any, and in addition such damages as the trier of fact may assess.

/s/ Mark A. Newell
MARK A. NEWELL
Attorney for Defendants
Steven C. Gwin and
Jan A. Gwin

Of Counsel:
BARKER & JANECKY, P.C.
3300 First National Bank Building
Post Office Box 2987
Mobile, Alabama 36652
(205) 432-8786

(Certificate of Service Omitted in Printing)

KEY #33073 R200 87

CONTRACT CURRENT THRU 8/91.

TERMINIX. INTERNATIONAL

THE TERMINIX INTERNATIONAL COMPANY L.P.

TERMITE PROTECTION PLAN

GUARANTEE NO. PR 08870291-08

C
011-02
632F

TRANSFERRED TO: G Michael Dobson

PURCHASER Steve G#in TELEPHONE _____

MAIL ADDRESS 114 Fels

CITY Fairhope, STATE Al ZIP CODE 36532

DESCRIPTION OF PROPERTY Residence

PROPERTY ADDRESS _____

CITY _____ STATE _____ ZIP CODE _____

Effective 8/25/87 through 8/14/88, for the sum of $ 585.87 Terminix will provide the necessary service to protect the identified property against the attack of subterranean termites *(Reticulitermes sp., Heterotermes sp.)*.

Terminix will extend protection annually to the original owner for the LIFETIME of the identified property subject to the general conditions of this agreement for $ 65.87 per year payable on or before the end of the previous protection period. After the third year and each year thereafter, Terminix reserves the right to revise the annual extension charge. After this Plan is renewed beyond the initial contract term, Terminix will periodically reinspect the identified property and any further treatment found necessary will be performed free.

In the event of additions or alterations to the identified property, Purchaser must arrange with Terminix for additional service which may require an adjustment to the annual extension charge.

This Plan provides protection against new subterranean termite damage to the structure and contents. If new damage occurs during the contract term, Terminix will, upon notification and inspection, arrange for the necessary repairs and pay the cost of labor and materials not to exceed $100,000. New damage is damage associated with an active termite infestation. Unless live termites are found in the damaged area, the damage discovered is old damage and not covered under this Plan.

Upon transfer of ownership of the identified property, protection against subterranean termites may be continued upon the request of the new owner and upon payment of a contract transfer fee of $ 25.00. In addition, Terminix reserves the right to revise the annual extension charge upon transfer of ownership. In the event the new owner fails to request continued coverage or does not agree to pay the transfer fee or the revised annual extension charge, the Termite Protection Plan will terminate automatically as of the date of this change of ownership.

Any additional provisions attached hereto including the general conditions and arbitration provision on the reverse side and the inspection graph dated 8/25/87 are part of this plan.

THE TERMINIX INTERNATIONAL COMPANY L.P. hereby guarantees the fulfillment of the terms of this Plan.

EXHIBIT A

Carlos H Carter

BY _____
TERMINIX MANAGER

EXECUTED AT MEMPHIS, TENNESSEE

59

201

110799

D.P. – A/R ACCT. NO.

DIV.	RT. #	ZONE	ACCT. NO.
08			104200

☒ NEW D.P. ACCT. NO.
☐ EXISTING D.P. ACCT. NO.

INVOICE

Terminix Service

P.O. BOX 1830
DAPHNE, AL 36526

TERMINIX
TERMITE and PEST CON

8/26/87
DATE

Steve Gwin
114 Fels Ave
Fairhope, Al 36532

$_____
AMOUNT PAID

Please detach and return with check - thank you.

	Effective Date	Circle One	Rate
☐ Pest Service Contract $_____	_____	E1 – E2 – M – Q1 – Q2 – Q3	$_____
☒ Termite Protection $ 585.87	☐ New Bldg. ☒ Existing Bldg.		_____ Phone
☐ Special Work $_____	Type_____		

Service Address_____

Lot _____ Sub-Division _____

*TERMS OR SPECIAL INSTRUCTIONS:
102 ev 532F

INVOICE AMOUNT $_____
TAX (If Applicable) $_____
INVOICE TOTAL $ 585.87
Paid On Completion $ -0-
* NOW DUE $ 585.87

CUSTOMER COPY

Thank You!

110799

IN THE CIRCUIT COURT FOR THE
TWENTY-EIGHTH JUDICIAL CIRCUIT OF
ALABAMA, BALDWIN COUNTY

Civil Action Number CV-91-796

G. MICHAEL DOBSON and WANDA C. DOBSON,
Plaintiffs,

VS.

THE TERMINIX INTERNATIONAL COMPANY, L.P.,
TERMINIX SERVICE, STEVEN C. GWIN and JAN A. GWIN,
Defendants.

Civil Action Number CV-92-197

STATE FARM FIRE & CASUALTY COMPANY,
Plaintiff,

VS.

STEVEN C. GWIN, JAN A. GWIN, G. MICHAEL DOBSON
and WANDA C. DOBSON,
Defendants.

The testimony of WILLIAM DANIEL CALHOUN, taken at the Law Offices of Irby & Heard, 317 Magnolia Avenue, Fairhope, Alabama, on the 20th day of July, 1992, commencing at approximately 3:00 o'clock, p.m.

* * * *

[1652] Q Okay. Then the commission for Irvine Company would be included on the second page at the very top right?

A That's correct.

Q I think five thousand four hundred, and fifty cents?

A Right.

Q I got it right that time. What about if there's any charge for the wood infestation report or the transfer of the termite protection plan, would there be any—where would that be noted?

A Here, where it says pest inspection.

Q Would both charges be shown down there if there were any?

A Generally, yeah, they are. You know, if there's a charge for a clearance letter, that charge would be shown. I—generally I don't think Terminix charges a—makes any charges for the transfer of a termite bond.

Q Was Terminix paid anything, based on that closing statement, for the wood infestation report presented to you at closing?

A Apparently not, according to this closing statement.

Q Let me show you what's marked Defendant's Exhibit [1653] 4, 5, and then I think 6 is just a copy, again, of the first page of 5 with additional signatures at the bottom, and ask you if you remember these documents being present at closing, also?

A Yes, they were.

Q All—both—all three?

A All three, yes.

Q And was Number 2 two pages as it is there with a graph attached? That is Number 5, I mean.

A Yes. That would be correct.

Q Okay. Now, can you tell me what you remember about discussing at the closing, if anything, about termite problem, termite damage, or termite infestation?

A Generally what I do—and I'm sure it's probably—it is the way I handled this closing. You know, primarily you look to see if there is any active infestation or any evidence of any active infestation of wood-destroying insects. And which this states no visible evidence of infestation of wood-destroying insects. I think there was some discussion of the—I know there was some discussion of the previous damage that is shown here on the graph.

Q Do you remember what that discussion was?

A As far as I recall, I generally state that it is [1654] not—it is not uncommon for—an older house, and it was my understanding that this was an older house, I hadn't viewed the house, I knew the general location of it, that it is not unusual for there to be some previous damage in a—in a house of—you know, that may be thirty, forty or so years old.

And that's fairly—fairly common. The contract calls that there be—that the termite report state that there be no evidence of active infestation of wood-destroying insects, which this one does state.

Q Okay. Now, were all three of these documents, to your knowledge, presented to the purchaser, the Dobsons, at the closing?

A Yes. I'm sure they—they were discussed with the Dobsons at closing.

Q And, in fact, I think six shows signatures?

A Right. Exactly. And also the termite—it was explained to them that there was an existing termite bond on the property that was being transferred.

Q What, if anything, would be said about the coverage provided by the termite protection plan?

A I generally don't get into the discussion of that.

* * * *

205-928-9248
P. O. Box 1436, Fairhope, AL 36533

Irvine co. inc. Real Estate

FOR IDENTIFICATION (1)
DTD 205-990-7170
27986 Highway 98, Daphne, AL 36527

1664

PURCHASE AGREEMENT

Date 29 March 19 91 6:00 AM/PM

1. THE UNDERSIGNED, HEREINAFTER CALLED THE BUYER, HEREBY OFFERS TO BUY THE PROPERTY located in the city of Fairhope County of Baldwin, Alabama, commonly known as 114 Fels and legally described as: Lot 3 + West 2 ft. of Lot 2 Block 14, according to Plat No. 6 p. 38 for the sum of (exactly) Seventy-Seven Thousand One Hundred and Fifty Dollars ($ 77,150).

2. THE TERMS OF PURCHASE SHALL BE as indicated by "x" below: (other unmarked terms of purchase do not apply).

CASH: ( ) The full purchase price upon execution and delivery of Warranty Deed/Bill of Sale.

NEW MTG: (X) The full purchase price upon execution and delivery of Warranty Deed/Bill of Sale, contingent upon Buyer's ability to obtain a 30 year FHA (type) mortgage, in the amount of $ 77500 bearing an interest rate not to exceed 9½ % computed monthly, on or before the date the sale is to be closed, which Buyer agrees to apply for immediately and accept promptly if tendered. The appraisal fee and cost of credit report, if any, shall be paid at time of application by Buyer. Buyer is to pay the loan closing cost including prepaid items, closing fees (except those not allowed on VA loan) and recording fee. Discount points, not to exceed 1 to be paid by (Buyer/~~Seller~~). Origination fee not to exceed 1 points shall be paid by (Buyer/Seller). Seller agrees to pay deed preparation fee. On FHA mortgages it is expressly agreed that, notwithstanding any other provisions of this contract, the Buyer shall not be obligated to complete the purchase of the property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise unless the Seller has delivered to the Buyer a written statement issued by the Federal Housing Commissioner or a Direct Endorsement Lender setting forth the appraised value of the property (excluding closing costs) of not less than $ 77150.00 which statement the Seller hereby agrees to deliver to the Buyer promptly after such appraised value statement is made available to Seller. The Buyer shall, however, have the privilege and option of proceeding with the consummation of the contract without regard to the amount of the appraised valuation. The appraised valuation is arrived at to determine the maximum mortgage the Department of Housing and Urban Development will insure. HUD does not warrant the value or the condition of the property. The Purchaser should satisfy himself/herself that the price and condition of the property are acceptable. (Buyer/Seller) agrees to meet any repair or other requirements for mortgage loan purposes, not to exceed $_____.

VENDOR'S LIEN: ( ) $_____ upon execution and delivery of Warranty Deed/Bill of Sale with Vendor's Lien reserved wherein the balance of $_____ shall be payable in (_____monthly _____annual) installments of $_____ (including/plus) interest at _____% per annum. Interest to start on date of closing and the first payment to become due _____ after closing. No penalty for prepayment. Buyer to pay closing fee and recording fee. Vendor's Lien (shall/shall not) be assumable without written consent of lien holder, and the Vendor's Lien or Note (shall/shall not) contain a late charge provision of _____% of an installment when paid more than _____ days after due date thereof. Buyer to supply a one year hazard insurance policy at closing with standard mortgage clause. Buyer agrees to provide, at his/her expense, a credit report, verification of income and other financial data satisfactory to Seller.

EQUITY: ( ) Upon execution and delivery of Warranty Deed/Bill of Sale assuming existing mortgage or Vendor's Lien, Buyer to pay the difference (approx./exactly) $_____ between the purchase price above and the unpaid balance (approx./exactly) $_____ of said mortgage or Vendor's Lien which Buyer agrees to assume and pay at an interest rate not to exceed _____%. Seller agrees to transfer tax escrow amounts to Buyer in proper balance and interest is to be prorated to date of closing. In the event the existing insurance policy is assumed by the Buyer, the premium will be prorated as of the date of closing. Mortgage payment to be current at time of closing. Buyer to pay mortgage transfer fee, recording fee and all other costs and fees charged by lender. Seller (shall/shall not) be released of liability for the indebtedness being assumed. If mortgagee approval is required for assumption, this contract is contingent upon such approval and Buyers agree to apply for mortgage assumption immediately.

3. AGENCY DISCLOSURE: The listing agency Irvine Co Inc. represents the Seller (unless otherwise stated), and the selling agency IRVINE Co. Inc. represents the (X) Seller ( ) Buyer. Seller's initials _____ Buyer's initials JHW.

4. OTHER PROVISIONS: Subject to approval of Fairhope Single Tax Corporation. Subject to marketable title as defined in paragraph 9 of this contract.

5. ALL IMPROVEMENTS, PERMANENT FIXTURES, AND APPURTENANCES ARE INCLUDED in the purchase price, except Mirror in bathroom and do include curtain fixtures in bedroom + kitchen.

6. A HOME OWNER'S WARRANTY (will/~~will not~~) be provided at closing by (Buyer/Seller).

7. SALE SHALL BE CLOSED and deed delivered on or before 30 April 19 91. Time shall be of the essence with all terms, conditions and particulars of this agreement. Title to be taken in the names of G. Michael + Wanda C. Dobson (with/without) right of survivorship in a form satisfactory to Buyers. The property is sold and is to be conveyed subject to any mineral and mining rights not owned by Seller and subject to present zoning and flood plain classification, utility easements, covenants and restrictions and building set back line. Seller owned mineral rights do _____ do not X transfer.

8. POSSESSION OF THE PROPERTY is to be given the Buyer on or before = JHW days after closing. In the event possession cannot be given on such date, Seller shall pay $ — per day as rental after such period, but will vacate by — without fail.

9. AN OWNER'S POLICY of title insurance in the amount of the purchase price is to be furnished by the Seller. Mortgagee title insurance and closing fee shall be paid for by the Buyer. A current survey shall be provided prior to closing and will be paid for by the (Buyer/Seller).

10. FOR VALUABLE CONSIDERATION, Buyer gives the Listing Broker, named above until 5:00 PM AM/PM to obtain the written acceptance of this offer and agrees that this offer, when signed, will constitute a binding agreement between Buyer and Seller and herewith deposits $ 1000.00 (check/cash) evidencing Buyer's good faith. Said funds are to be deposited in escrow by said Selling Broker and shall be applied to the purchase price on the date of closing. If this offer is not accepted or the title is not marketable, or if the terms of purchase are contingent upon ability to obtain new mortgage or Vendor's Lien or other contingencies as specified which cannot be met, this deposit shall be refunded. In the event of default by Buyer, all deposits made hereunder may be forfeited as liquidated damages at Seller's election, or alternatively, Seller may retain such deposits as part payment of the purchase price and pursue his legal and equitable remedies hereunder against Buyer. A mutual release signed by all parties to this contract will be required before any funds can be released. Earnest money to be applied upon acceptance of offer.

11. BUYERS AND SELLERS acknowledge that they have read paragraphs 16 through 23 on the reverse of this page and that these paragraphs are part of this contract. Buyers and Sellers acknowledge receipt of a copy of this agreement. Seller's initials _____ Buyer's initials JHW

Witness Frankie Evans — x [signature] — Buyer SS# 436-52-3921
Buyer's Address P.O. Box 557 — x [signature] — Buyer SS# 434-76-1475
Bay Clear AL 36564 — Phones: Res. 928 3745 — Office 342 4250

SELLER'S ACCEPTANCE: Dated: _____ 19____ _____ AM/PM

12. THE ABOVE OFFER IS HEREBY ACCEPTED _____

13. IN THE EVENT A COUNTER OFFER is made, it shall expire on _____ _____ AM/PM if Buyer has not given prior written acceptance.

14. SELLER AGREES TO PAY LISTING BROKER a commission in accordance with the signed Sales Authority for negotiating this sale. If Buyer defaults, the earnest money shall be split between the Seller and Listing Broker in accordance with the Sales Authority.

Witness [illegible] — x [signature] — Seller SS# 412-21-1157
Seller's Address 114 Fels Ave — [signature] — Seller SS# 416 78 6916
Fairhope AL 36532 — Phones: Res. 928 4918 — Office 1132 1725

BUYER'S ACCEPTANCE OF COUNTER OFFER/RECEIPT OF ACCEPTANCE:

15. BUYER ACKNOWLEDGES RECEIPT of Seller's acceptance of Buyer's offer. In the event this acceptance was subject to certain changes from the Buyer's offer, the Buyer agrees to accept said changes. All other provisions of the original [illegible]

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16. SELLER IS TO FURNISH WRITTEN EVIDENCE from a bonded and licensed termite control company that a visual inspection by them indicates the dwelling is free from infestation by wood destroying insects and damage caused by currently active infestation. OLD DAMAGE IS NOT CONSIDERED. The current termite contract, if any, is to be transferred to Buyer at Buyer's expense.

17. ALL PROPERTY TAXES, except of equity sales with escrow account, and any rentals being collected from existing tenants, to be prorated at time of closing.

18. PROPERTY ASSESSMENTS which become a lien on the property prior to closing date shall be paid by the Seller, without proration. Any special improvements now installed, but not yet a lien, shall be assumed by the Buyer.

19. THE PURCHASE PRICE AND TERMS OF THIS SALE MAY BE DISCLOSED by the REAL ESTATE CO. in the ordinary conduct of their business.

20. THE FOREGOING CONSTITUTES THE entire agreement. No terms or conditions agreed on verbally will be recognized. Any change must be in writing and approved by all parties. Real Estate agents are not to be held liable for any conditions or non-performance of this agreement.

21. NEITHER SELLER NOR ANY AGENT MAKES ANY REPRESENTATIONS OR WARRANTIES, EITHER VERBAL OR IMPLIED, REGARDING THE CONDITION OF THE PROPERTY EXCEPT TO THE EXTENT EXPRESSLY AND SPECIFICALLY SET FORTH HEREIN. Buyer has the obligation to determine, either personally or through or with a representative of Buyer's choosing, any and all conditions of the property without limitation, the condition of the heating, cooling, plumbing and electrical systems and any built-in appliances and the roof and the basement, including leaks therein; the size and area of the property, construction materials, including floors, structural condition; utility sewer or septic tank availability and condition/subsurface conditions, potentially hazardous gases, including radon, and any matters affecting the character of the neighborhood. BUYER HAS EXAMINED THIS PROPERTY AND AGREES TO ACCEPT SAME IN ITS PRESENT CONDITION, EXCEPT AS MAY BE SPECIFIED HEREIN.

22. HEATING, COOLING, PLUMBING AND ELECTRICAL systems and all included appliances shall be warranted by Seller to be in working order at time of conveyance. Buyer or his representative shall be responsible for inspection of same prior to conveyance. Inspection expense, if any, shall be paid by the Buyer.

23. A FURTHER PERIOD OF 30 days shall be allowed for closing if (a) the closing is delayed by reason of delays in abstracting or by title defects which can be readily corrected, or if (b) the terms of the purchase require a new mortgage and the lender issues a commitment prior to the date of closing, but is delayed in consummating the mortgage. Risk or loss by fire or other casualty, or condemnation shall be on the Seller until title is conveyed.

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AMENDATORY CLAUSE

"It is expressly agreed that notwithstanding any other provisions of this contract, the purchaser shall not be obligated to complete the purchase of the property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise unless the mortgagee has delivered to the purchaser a written statement issued by the Federal Housing Commissioner or a Direct Endorsement lender setting forth the appraised value of the property (excluding closing costs) of not less than $ 77,150.00 which statement the mortgagee hereby agrees to deliver to the purchaser promptly after such appraised value statement is made available to the mortgagee. The purchaser shall, however, have the privilege and option of proceeding with consummation of the contract without regard to the amount of the appraised valuation. The appraised valuation is arrived at to determine the maximum mortgage the Department of Housing and Urban Development will insure. HUD does not warrant the value nor the condition of the property. The purchaser should satisfy himself/herself that the price and condition of the property are acceptable."

Signed:

Borrower
G. MICHAEL DOBSON

Borrower
WANDA C. DOBSON

Seller
STEVEN C. GWIN

Seller
JAN A. GWIN

FRM 9002
Rev. 7/90

67

205-928-9248
P. O. BOX 1436, FAIRHOPE, AL 36533

Irvine
co. inc.
Real Estate

205-626-7170
27985 HIGHWAY 98, DAPHNE, AL 36526

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ADDENDUM

1. This is an amendment to the PURCHASE AGREEMENT covering the _____ real property, ___X___ leasehold property commonly known as 114 Fels Ave - Fairhope, Al dated 29 March 1991 between G. Michael + Wanda C. Dobson (Buyer) and Steven C. + Jan A. Erwin (Seller).

2. Applicable conditions of the purchase shall be as indicated by an "X" below and initialed by the buyer. (Other unmarked conditions do not apply.)

a. _____ For an equity sale, assuming the existing mortgage:

(1) Copy of said mortgage is attached and acknowledged to have been received by buyer. _____ / _____ (Buyers' initials)

(2) Offer is made subject to receiving copy of said mortgage. _____ / _____ (Buyers' initials)

b. _____ If subject to any existing recorded restrictions, easements, reservation or leases:

(1) Copy is attached and acknowledge to have been received by buyers. _____ / _____ (Buyers initials).

(2) Offer is made subject to receiving applicable copies. _____ / _____. (Buyers' initials)

3. THE UNDERSIGNED PARTIES HEREBY AGREE TO ANY ADDITIONAL TERMS OR CONDITIONS AS FOLLOWS:

The closing date of April 30, 1991 has been extended until on or before May 15, 1991.

4. The terms of this addendum, upon its execution by both parties, are herewith made an integral part of the aforementioned Purchase Agreement.

Date: 4/24/91 Time: 1:40 P.M.

G. Michael Dobson (Buyer)

Wanda C. Dobson (Buyer)

Date: 4/25/91 Time: 5:05 PM

x _____ (Seller)

x Jan A Erwin (Seller)

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CONTRACT CURRENT THRU 8/91.

KEY #33073 REV. 4/87

TERMINIX INTERNATIONAL

THE TERMINIX INTERNATIONAL COMPANY L.P.

TERMITE PROTECTION PLAN

GUARANTEE NO. PR 08870291-08

C
011-02
632F

TRANSFERRED TO: G Michael Dobson

PURCHASER Steve Gwin TELEPHONE

MAIL ADDRESS 114 Fels

CITY Fairhope, STATE Al ZIP CODE 36532

DESCRIPTION OF PROPERTY Residence

PROPERTY ADDRESS

CITY STATE ZIP CODE

Effective 8/25/87 through 8/14/88, for the sum of $ 585.87 Terminix will provide the necessary service to protect the identified property against the attack of subterranean termites *(Reticulitermes sp., Heterotermes sp.)*.

Terminix will extend protection annually to the original owner for the LIFETIME of the identified property subject to the general conditions of this agreement for $ 65.87 per year payable on or before the end of the previous protection period. After the third year and each year thereafter, Terminix reserves the [illegible] annual extension charge. After this Plan is renewed beyond the initial contract term, Terminix will periodically reinspect the identified property and any further treatment found necessary will be performed free.

In the event of additions or alterations to the identified property, Purchaser must arrange with Terminix for additional service which may require an adjustment to the annual extension charge.

This Plan provides protection against new subterranean termite damage to the structure and contents. If new damage occurs during the contract term, Terminix will, upon notification and inspection, arrange for the necessary repairs and pay the cost of labor and materials not to exceed $100,000. New damage is damage associated with an active termite infestation. Unless live termites are found in the damaged area, the damage discovered is old damage and not covered under this Plan.

Upon transfer of ownership of the identified property, protection against subterranean termites may be continued upon the request of the new owner and upon payment of a contract transfer fee of $ 25.00. In addition, Terminix reserves the right to revise the annual extension charge upon transfer of ownership. In the event the new owner fails to request continued coverage or does not agree to pay the transfer fee or the revised annual extension charge, the Termite Protection Plan will terminate automatically as of the date of this change of ownership.

Any additional provisions attached hereto including the general conditions and arbitration provision on the reverse side and the inspection graph dated 8/25/87 are part of this plan.

FOR IDENTIFICATION
D EX
11-19-92 AJC

THE TERMINIX INTERNATIONAL COMPANY L.P. hereby guarantees the fulfillment of the terms of this Plan.

Carlon H Carter

BY
TERMINIX MANAGER

EXECUTED AT MEMPHIS, TENNESSEE

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GENERAL CONDITIONS

1. **EXISTING DAMAGE.** Terminix is not responsible for the repair of either visible damage (noted on the attached Inspection Graph) or hidden damage existing as of the date of this agreement. Because damage may be present in areas which are inaccessible to visual inspection, Terminix does not guarantee that the damage disclosed on the Inspection Graph represents all of the existing damage as of the date of this agreement.

2. **WATER LEAKAGE.** Water leakage in treated areas, and leakage in interior areas or through the roof or exterior walls of the identified property, may destroy the effectiveness of Terminix's treatment and is conducive to new infestation. Purchaser is responsible for making timely repairs as are necessary to stop the leakage. Upon completion of repairs by Purchaser, Terminix will provide additional treatment to control infestation at Purchaser's expense. If Purchaser elects not to repair said defects or purchase the additional necessary treatment, then Terminix shall have no further obligation under this agreement.

3. **ADDITIONS, ALTERATIONS.** This agreement covers the property identified on the Inspection Graph as of the date of initial treatment. In the event the premises are structurally modified, altered or otherwise changed or if soil is removed or added around the foundation, Purchaser will immediately notify Terminix and will purchase the additional treatment required by the changes incurred. Failure to do so will terminate this agreement automatically. In the event of structure modification, Terminix also reserves the right to adjust the annual extension charge.

4. **NOTICE OF CLAIMS, ACCESS TO PROPERTY.** Any claim under the terms of this agreement must be made immediately in writing to any Terminix office. Terminix is only obligated to perform under this agreement if the Purchaser allows Terminix access to the identified property for any purpose contemplated by this Agreement, including but not limited to reinspection, whether the inspection was requested by the Purchaser or considered necessary by Terminix.

5. **DISCLAIMER.**

A. Terminix's liability under this agreement will be terminated if Terminix is prevented from fulfilling its responsibilities under the terms of this agreement by reason of delays in transportation, shortages of fuel and/or materials, strikes, embargoes, fires, floods, quarantine restrictions, or any other act of God or circumstances or cause beyond the control of Terminix.

B. This agreement does not cover and Terminix will not be responsible for:
(1) Damage resulting from moisture conditions, including but not limited to fungus damage, and/or
(2) Damage resulting from masonry failure or grade alterations.

C. This agreement excludes coverage on formosan termites *(Coptotermes sp.)*.

D. TERMINIX DISCLAIMS ANY LIABILITY FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES. THE GUARANTEES STATED IN THIS AGREEMENT ARE GIVEN IN LIEU OF ANY OTHER GUARANTEE OR WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

6. **CHANGE IN LAW.** Terminix performs its services in accordance with the requirements of federal, state and local law. In the event of a change in existing law as it pertains to the services promised herein, Terminix reserves the right to revise the annual extension charge or terminate this agreement.

7. **NON-PAYMENT, DEFAULT.** In case of non-payment or default by the Purchaser, Terminix has the right to terminate this agreement and reasonable attorney's fees and cost of collection shall be paid by Purchaser, whether suit is filed or not. In addition, interest at the highest legal rate will be assessed for the period of delinquency.

8. **ENTIRE AGREEMENT.** The Service Order signed at the time of purchase, the Agreement and the Inspection Graph constitute the entire agreement between the parties and no other representations or statements will be binding upon the parties.

9. **ARBITRATION.** The Purchaser and Terminix agree that any controversy or claim between them arising out of or relating to the interpretation, performance or breach of any provision of this agreement shall be settled exclusively by arbitration. Such arbitration shall be conducted in accordance with the Commercial Arbitration Rules then in force of the American Arbitration Association before three arbitrators appointed by the American Arbitration Association. The arbitration award shall be final and binding on both parties. Judgment upon such arbitration award may be entered in any court having jurisdiction.

10. **SEVERABILITY.** If any part of this agreement is held to be invalid or unenforceable for any reason, the remaining terms and conditions of this agreement shall remain in full force and effect.

IN THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA

Civil Action Number: CV-91-796

G. MICHAEL DOBSON and WANDA C. DOBSON,
Plaintiffs,

vs.

THE TERMINIX INTERNATIONAL COMPANY, L.P.,
TERMINIX SERVICE, STEVEN C. GWIN, and JAN A. GWIN,
Defendants.

AFFIDAVIT OF W. BRUCE ALVERSON IN SUPPORT OF MOTION BY DEFENDANTS, ALLIED-BRUCE TERMINIX COMPANIES, INC., D/B/A TERMINIX SERVICE AND TERMINIX INTERNATIONAL COMPANY, L.P., FOR STAY PENDING ARBITRATION AND FOR ORDER COMPELLING ARBITRATION

[Filed Aug. 14, 1992]

STATE OF ALABAMA:

COUNTY OF MOBILE:

Before me, the undersigned Notary Public in and for said State and County, personally appeared W. Bruce Alverson, who being by me first duly sworn, on oath deposes and says as follows:

1. My name is W. Bruce Alverson, and I am over the age of twenty-one (21) years. I serve as Eastern Zone Vice President for Defendant Allied-Bruce Terminix Companies, Inc., d/b/a Terminix Service (hereinafter referred to as "Terminix Service"). In such capacity, I have custody and access to the records of said corporation pertain-

ing to the claims involved in this suit and personal knowledge of the matters hereinafter set forth.

2. Defendant Terminix Service is a corporation organized under the laws of the State of Arkansas with offices located in the states of Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Oklahoma and Texas. A true and correct copy of the service order and termite protection plan issued by Defendant Terminix Service to Defendant Steven C. Gwin and subsequently assigned to Plaintiff G. Michael Dobson are attached hereto marked Exhibits "A" and "B" respectively and made a part thereof for all purposes and expressly incorporated by reference as if fully restated herein. Most of the materials and equipment including specifically the chemical used to treat the home involved in this suit were purchased by Defendant Terminix Service outside of the State of Alabama and transferred to the State of Alabama for use on the home.

3. The facts stated in this Affidavit are true and correct. In verification of the truth of said facts and the truth of this Affidavit, my signature is subscribed hereto.

4. Further, Affiant sayeth not.

/s/ W. Bruce Alverson
W. BRUCE ALVERSON
Eastern Zone Vice President for
Allied-Bruce Terminix
Companies, Inc.,
d/b/a Terminix Service

Sworn to and subscribed before me on this the 12th day of August, 1992.

/s/ T. Julian Motes
NOTARY PUBLIC

My Commission Expires:
11-7-92

/s/ T. Julian Motes
JOSEPH P. JONES, JR.
T. JULIAN MOTES
Attorneys for Defendants,
Terminix International
Company, L.P. and
Allied-Bruce Terminix
Companies, Inc., d/b/a
Terminix Service

OF COUNSEL:

SIROTE & PERMUTT, P.C.
One St. Louis Centre, Suite 1000
Post Office Drawer 2025
Mobile, Alabama 36652

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 13th day of August, 1992, served a copy of the foregoing pleading on:

Allan R. Chason, Esq.
Chason & Chason, P.C.
Post Office Box 100
Bay Minette, Alabama 36507

George R. Irvine, III, Esq.
Stone, Granade, Crosby & Blackburn
Post Office Drawer 1509
Bay Minette, Alabama 36507

Mark A. Newell, Esq.
Barker & Janecky, P.C.
Post Office Box 2987
Mobile, Alabama 36652

by mailing a copy of same via United States mail, properly addressed and first class postage prepaid.

/s/ T. Julian Motes

TERMINIX INTERNATIONAL, INC.

NOTE TO CUSTO 27

This is a service order and copy of the Termite Protection Plan. The official Termite Protection Plan will be mailed to you when the work is completed and Terminix has been paid in full.

TERMITE PROTECTION PLAN

PURCHASER Steve Flynn TELEPHONE _____

MAIL ADDRESS 114 Felix Ave

CITY Fairhope STATE Ala ZIP CODE _____

DESCRIPTION OF PROPERTY Res

PROPERTY ADDRESS SAME

CITY Fairhope STATE Ala ZIP CODE _____

Effective 8-25-87 through 8-25-88 for the sum of $ 585.00 Terminix will provide the necessary service to protect the identified property against the attack of subterranean termites *(Reticulitermes sp., Heterotermes sp.)*.

Terminix will extend protection annually to the original owner for the LIFETIME of the identified property subject to the general conditions of this agreement for $ 65.87 per year payable on or before the end of the previous protection period. After the third year and each year thereafter, Terminix reserves the right to revise the annual extension charge. After this Plan is renewed beyond the initial contract term, Terminix will periodically reinspect the identified property and any further treatment found necessary will be performed free.

In the event of additions or alterations to the identified property, Purchaser must arrange with Terminix for additional service which may require an adjustment to the annual extension charge.

This Plan provides protection against new subterranean termite damage to the structure and contents. If new damage occurs during the contract term, Terminix will, upon notification and inspection, arrange for the necessary repairs and pay the cost of labor and materials not to exceed $100,000. New damage is damage associated with an active termite infestation. Unless live termites are found in the damaged area, the damage discovered is old damage and not covered under this Plan.

This protection plan and/or any extension thereof will be effective only upon payment of the charges as provided herein.

Any additional provisions attached hereto including the general conditions and arbitration provision on the reverse side and the inspection graph dated -0- are part of this plan.

Upon transfer of ownership of the identified property, protection against subterranean termites may be continued upon the request of the new owner and upon payment of a contract transfer fee of $ _____. In addition, Terminix reserves the right to revise the annual extension charge upon transfer of ownership. In the event the new owner fails to request continued coverage or does not agree to pay the transfer fee or the revised annual extension charge, the Termite Protection Plan will terminate automatically as of the date of the change of ownership.

NOTICE: YOU, THE PURCHASER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FOR AN EXPLANATION OF THIS RIGHT.

PURCHASER Steve & Flynn DATE 8-25-87

TERMINIX REPRESENTATIVE Edward Lack DATE _____

TERMINIX ADDRESS P.O. Box 1830 TELEPHONE _____

CITY Enfield STATE Ala ZIP CODE _____

SERVICE MANAGER

KEY #33069 / 3-85 RP 0/9[illegible] ...tional, Inc. 1988

DEFENDANT'S EXHIBIT [illegible] A

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GENERAL CONDITIONS

1. **EXISTING DAMAGE.** Terminix is not responsible for the repair of either visible damage (noted on the attached Inspection Graph) or hidden damage existing as of the date of this agreement. Because damage may be present in areas which are inaccessible to visual inspection, Terminix does not guarantee that the damage disclosed on the Inspection Graph represents all of the existing damage as of the date of this agreement.

2. **WATER LEAKAGE.** Water leakage in treated areas, and leakage in interior areas or through the roof or exterior walls of the identified property, may destroy the effectiveness of Terminix's treatment and is conducive to new infestation. Purchaser is responsible for making timely repairs as are necessary to stop the leakage. Upon completion of repairs by Purchaser, Terminix will provide additional treatment to control infestation at Purchaser's expense. If Purchaser elects not to repair said defects or purchase the additional necessary treatment, then Terminix shall have no further obligation under this agreement.

3. **ADDITIONS, ALTERATIONS.** This agreement covers the property identified on the Inspection Graph as of the date of initial treatment. In the event the premises are structurally modified, altered or otherwise changed or if soil is removed or added around the foundation, Purchaser will immediately notify Terminix and will purchase the additional treatment required by the changes incurred. Failure to do so will terminate this agreement automatically. In the event of structure modification, Terminix also reserves the right to adjust the annual extension charge.

4. **NOTICE OF CLAIMS, ACCESS TO PROPERTY.** Any claim under the terms of this agreement will be made immediately in writing to any Terminix office. Terminix is only obligated to perform under this agreement provided the Purchaser allows Terminix access to the identified property for any purpose contemplated by this Contract, including but not limited to reinspection, whether the inspection was requested by the Purchaser or considered necessary by Terminix.

5. **DISCLAIMER.**

A. Terminix's liability under this agreement will be terminated if Terminix is prevented from fulfilling its responsibilities under the terms of this agreement by reason of delays in transportation, shortages of fuel and/or materials, strikes, embargoes, fires, floods, quarantine restrictions, or any other act of God or circumstances or cause beyond the control of Terminix.

B. This agreement does not cover and Terminix will not be responsible for:
   (1) Damage resulting from moisture conditions, including but not limited to fungus damage, and/or
   (2) Damage resulting from masonry failure or grade alterations.

C. This agreement excludes coverage on formosan termites *(Coptotermes sp.)*

D. TERMINIX DISCLAIMS ANY LIABILITY FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES. THE GUARANTEES STATED IN THIS AGREEMENT ARE GIVEN IN LIEU OF ANY OTHER GUARANTEE OR WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

6. **CHANGE IN LAW.** Terminix performs its services in accordance with the requirements of federal, state and local law. In the event of a change in existing law as it pertains to the services promised herein, Terminix reserves the right to revise the annual extension charge or terminate this agreement.

7. **NON-PAYMENT, DEFAULT.** In case of non-payment or default by the Purchaser, Terminix has the right to terminate this agreement and reasonable attorney's fees and cost of collection shall be paid by Purchaser, whether suit is filed or not. In addition, interest at the highest legal rate will be assessed for the period of delinquency.

8. **ENTIRE AGREEMENT.** The Service Order signed at the time of purchase, the Agreement and the Inspection Graph constitute the entire agreement between the parties and no other representations or statements will be binding upon the parties.

9. **ARBITRATION.** The Purchaser and Terminix agree that any controversy or claim between them arising out of or relating to the interpretation, performance or breach of any provision of this contract which relates to new termite damage, as defined in this Agreement or the above Plan, shall be settled exclusively by arbitration. Such arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association before three arbitrators appointed by the American Arbitration Association. The arbitration award shall be final and binding on both parties. Judgment upon such arbitration award may be entered in any court having jurisdiction. If any part of this provision or if this provision is held to be invalid or unenforceable for any reason, the remaining terms and conditions of this contract shall remain in full force and effect. Claims relating to payment disputes shall not be subject to arbitration.

CONTRACT-CURRENT THRU 8/91

KEY #33073,REV

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TERMINIX INTERNATIONAL

THE TERMINIX INTERNATIONAL COMPANY L.P.

TERMITE PROTECTION PLAN

GUARANTEE NO. PR 08870291-08

C
011-02
632F

TRANSFERRED TO: G Michael Dobson

PURCHASER Steve GWin TELEPHONE

MAIL ADDRESS 114 Fels

CITY Fairhope, STATE Al ZIP CODE 36532

DESCRIPTION OF PROPERTY Residence

PROPERTY ADDRESS

CITY STATE ZIP CODE

Effective 8/25/87 through 8/14/88, for the sum of $ 585.87 Terminix will provide the necessary service to protect the identified property against the attack of subterranean termites *(Reticulitermes sp., Heterotermes sp.)*.

Terminix will extend protection annually to the original owner for the LIFETIME of the identified property subject to the general conditions of this agreement for $ 65.87 per year payable on or before the end of the previous protection period. After the third year and each year thereafter, Terminix reserves the right to revise the annual extension charge. After this Plan is renewed beyond the initial contract term, Terminix will periodically reinspect the identified property and any further treatment found necessary will be performed free.

In the event of additions or alterations to the identified property, Purchaser must arrange with Terminix for additional service which may require an adjustment to the annual extension charge.

This Plan provides protection against new subterranean termite damage to the structure and contents. If new damage occurs during the contract term, Terminix will, upon notification and inspection, arrange for the necessary repairs and pay the cost of labor and materials not to exceed $100,000. New damage is damage associated with an active termite infestation. Unless live termites are found in the damaged area, the damage discovered is old damage and not covered under this Plan.

Upon transfer of ownership of the identified property, protection against subterranean termites may be continued upon the request of the new owner and upon payment of a contract transfer fee of $ 25.00. In addition, Terminix reserves the right to revise the annual extension charge upon transfer of ownership. In the event the new owner fails to request continued coverage or does not agree to pay the transfer fee or the revised annual extension charge, the Termite Protection Plan will terminate automatically as of the date of this change of ownership.

Any additional provisions attached hereto including the general conditions and arbitration provision on the reverse side and the inspection graph dated 8/25/87 are part of this plan.

THE TERMINIX INTERNATIONAL COMPANY L.P. hereby guarantees the fulfillment of the terms of this Plan.

Carlon H Carter

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BY
TERMINIX MANAGER

EXECUTED AT MEMPHIS, TENNESSEE

DEFENDANT'S EXHIBIT B

KEY #33073 REV. 4/87 © The Terminix International Company L.P., 1987

ORIGINATING OFFICE COPY

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GENERAL CONDITIONS

1. **EXISTING DAMAGE.** Terminix is not responsible for the repair of either visible damage (noted on the attached Inspection Graph) or hidden damage existing as of the date of this agreement. Because damage may be present in areas which are inaccessible to visual inspection, Terminix does not guarantee that the damage disclosed on the Inspection Graph represents all of the existing damage as of the date of this agreement.

2. **WATER LEAKAGE.** Water leakage in treated areas, and leakage in interior areas or through the roof or exterior walls of the identified property, may destroy the effectiveness of Terminix's treatment and is conducive to new infestation. Purchaser is responsible for making timely repairs as are necessary to stop the leakage. Upon completion of repairs by Purchaser, Terminix will provide additional treatment to control infestation at Purchaser's expense. If Purchaser elects not to repair said defects or purchase the additional necessary treatment, then Terminix shall have no further obligation under this agreement.

3. **ADDITIONS, ALTERATIONS.** This agreement covers the property identified on the Inspection Graph as of the date of initial treatment. In the event the premises are structurally modified, altered or otherwise changed or if soil is removed or added around the foundation, Purchaser will immediately notify Terminix and will purchase the additional treatment required by the changes incurred. Failure to do so will terminate this agreement automatically. In the event of structure modification, Terminix also reserves the right to adjust the annual extension charge.

4. **NOTICE OF CLAIMS, ACCESS TO PROPERTY.** Any claim under the terms of this agreement must be made immediately in writing to any Terminix office. Terminix is only obligated to perform under this agreement if the Purchaser allows Terminix access to the identified property for any purpose contemplated by this Agreement, including but not limited to reinspection, whether the inspection was requested by the Purchaser or considered necessary by Terminix.

5. **DISCLAIMER.**

A. Terminix's liability under this agreement will be terminated if Terminix is prevented from fulfilling its responsibilities under the terms of this agreement by reason of delays in transportation, shortages of fuel and/or materials, strikes, embargoes, fires, floods, quarantine restrictions, or any other act of God or circumstances or cause beyond the control of Terminix.

B. This agreement does not cover and Terminix will not be responsible for:
   (1) Damage resulting from moisture conditions, including but not limited to fungus damage, and/or
   (2) Damage resulting from masonry failure or grade alterations.

C. This agreement excludes coverage on formosan termites *(Coptotermes sp.)*.

D. TERMINIX DISCLAIMS ANY LIABILITY FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES. THE GUARANTEES STATED IN THIS AGREEMENT ARE GIVEN IN LIEU OF ANY OTHER GUARANTEE OR WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

6. **CHANGE IN LAW.** Terminix performs its services in accordance with the requirements of federal, state and local law. In the event of a change in existing law as it pertains to the services promised herein, Terminix reserves the right to revise the annual extension charge or terminate this agreement.

7. **NON-PAYMENT, DEFAULT.** In case of non-payment or default by the Purchaser, Terminix has the right to terminate this agreement and reasonable attorney's fees and cost of collection shall be paid by Purchaser, whether suit is filed or not. In addition, interest at the highest legal rate will be assessed for the period of delinquency.

8. **ENTIRE AGREEMENT.** The Service Order signed at the time of purchase, the Agreement and the Inspection Graph constitute the entire agreement between the parties and no other representations or statements will be binding upon the parties.

9. **ARBITRATION.** The Purchaser and Terminix agree that any controversy or claim between them arising out of or relating to the interpretation, performance or breach of any provision of this agreement shall be settled exclusively by arbitration. Such arbitration shall be conducted in accordance with the Commercial Arbitration Rules then in force of the American Arbitration Association before three arbitrators appointed by the American Arbitration Association. The arbitration award shall be final and binding on both parties. Judgment upon such arbitration award may be entered in any court having jurisdiction.

10. **SEVERABILITY.** If any part of this agreement is held to be invalid or unenforceable for any reason, the remaining terms and conditions of this agreement shall remain in full force and effect.

IN THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA

(Title Omitted in Printing)

AFFIDAVIT OF DANIEL F. JOHNSON IN SUPPORT OF MOTION BY DEFENDANTS, ALLIED-BRUCE TERMINIX COMPANIES, INC., D/B/A TERMINIX SERVICE AND TERMINIX INTERNATIONAL COMPANY, L.P., FOR STAY PENDING ARBITRATION AND FOR ORDER COMPELLING ARBITRATION

[Filed Aug. 14, 1992]

STATE OF TENNESSEE:

COUNTY OF SHELBY:

Before me, the undersigned Notary Public in and for said State and County, personally appeared Daniel F. Johnson, who being by me first duly sworn, on oath deposes and says as follows:

1. My name is Daniel F. Johnson and I am over the age of twenty-one (21) years. I serve as Corporate Counsel for Defendant The Terminix International Company L.P. (hereinafter referred to as "Terminix International"). In such capacity, I have custody and access to the records of said company pertaining to the claims involved in this suit and personal knowledge of the matters hereinafter set forth.

2. Defendant Terminix International is a limited partnership organized under the laws of a State other than Alabama and with its principal place of business located in Memphis, Tennessee. Defendant Terminix International has offices located outside the State of Alabama,

and the general partner and limited partner of said Defendant are companies that have their principal places of business outside the State of Alabama.

3. A true and correct copy of the Termite Protection Plan (the "Plan") issued by Defendant Allied-Bruce Terminix Companies, Inc., d/b/a Terminix Service (hereinafter referred to as "Terminix Service") to Defendant Steven C. Gwin and subsequently assigned to Plaintiff G. Michael Dobson is attached hereto marked Exhibit "A" and made a part thereof for all purposes and expressly incorporated by reference as if fully restated herein. As shown by the terms of the Plan, Defendant Terminix International guarantees the fulfillment of the terms of the Plan.

4. The facts stated in this Affidavit are true and correct. In verification of the truth of said facts and the truth of this Affidavit, my signature is subscribed hereto.

5. Further, Affiant sayeth not.

/s/ Daniel F. Johnson
DANIEL F. JOHNSON
Corporate Counsel for
The Terminix International
Company L.P.

(Notary and Certificate of Service Omitted in Printing)

(Exhibit A Appears at pp. 75-78)

IN THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA

(Title Omitted in Printing)

MOTION OF DEFENDANTS, ALLIED-BRUCE TERMINIX COMPANIES, INC., D/B/A TERMINIX SERVICE AND TERMINIX INTERNATIONAL COMPANY, L.P., FOR STAY PENDING ARBITRATION AND FOR ORDER COMPELLING ARBITRATION

[Filed Aug. 14, 1992]

COME NOW, Allied-Bruce Terminix Companies, Inc., d/b/a Terminix Service ("Terminix Service") and Terminix International Company, L.P. ("Terminix International"), Defendants in the above-styled action, and move the Court for a stay of this action pending arbitration of the claims asserted by Plaintiffs, G. Michael Dobson and Wanda C. Dobson (hereinafter referred to collectively as "Dobson"), against Defendants, Terminix Service and Terminix International, and of the cross-claims asserted by Defendants, Steven C. Gwin and Jan A. Gwin (hereinafter referred to collectively as "Gwin"), against Defendants, Terminix Service and Terminix International, and for an order compelling the parties to arbitrate these claims. In support of this request, Defendants, Terminix Service and Terminix International, would offer the following:

1. Plaintiffs Dobson filed the present action against Defendants, Terminix Service and Terminix International, for alleged fraudulent misrepresentations concerning a visual inspection of a home purchased by Plaintiffs from Defendants Gwin and for an alleged negligent inspection

of the same. Plaintiffs Dobson also sued Defendants Gwin for alleged misrepresentations and for alleged fraudulent concealment relating to the same home.

2. Defendants filed answers to Plaintiffs' complaint denying the material allegations of the same and asserting several affirmative defenses. The parties proceeded with some discovery in this matter.

3. Plaintiffs Dobson recently filed their first amended complaint asserting for the first time an agency relationship between Defendant Terminix Service and Defendant Terminix International, a claim for punitive damages and a claim for breach of the termite protection plan issued by Defendant Terminix Service to Defendants Gwin and subsequently assigned to Plaintiffs Dobson. Defendants Gwin also recently filed a cross-claim asserting for the first time claims seeking affirmative relief from Defendants, Terminix Service and Terminix International. The cross-claim includes two counts consisting of a claim for breach of the termite protection plan originally issued by Defendant Terminix Service to Defendants Gwin and a claim for negligent inspections, treatments and performance of the contractual duties contained in the termite protection plan.

4. The termite protection plan made the basis of the claims asserted by Plaintiffs Dobson and Defendants Gwin against Defendants, Terminix Service and Terminix International, contains the following provision:

> The Purchaser and Terminix agree that any controversy or claim between them arising out of or relating to the interpretation, performance or breach of any provision of this agreement shall be settled exclusively by arbitration. Such arbitration shall be conducted in accordance with the Commercial Arbitration Rules then in force of the American Arbitration Association before three arbitrators appointed by the American Arbitration Association. The arbitration award shall be final and binding on

> both parties. Judgment upon such arbitration award may be entered in any court having jurisdiction.

The broad language of this arbitration provision shows that the parties to this contract agreed to submit any claims arising from the relationship established between the parties as a result of this agreement to arbitration and that the parties would be bound by any award issued out of such arbitration proceedings.

5. The Congress of the United States passed the Federal Arbitration Act in part to reverse centuries of judicial hostility to arbitration agreements and to place arbitration agreements upon the same footing as other contracts. *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1, 24-25 (1983); *A. G. Edwards & Sons, Inc. v. Clark*, 558 So.2d 358, 361 (Ala. 1990). If an agreement to arbitrate a dispute comes within the provisions of the Federal Arbitration Act, Alabama courts will enforce that agreement in accordance with the federal policy as expressed in the Act and the court decisions construing the same. *Ex parte McKinney*, 515 So.2d 693, 698 (Ala. 1987). The provisions of the Federal Arbitration Act, if applicable, serve to preempt any state law purporting to deny the enforcement of a predispute arbitration agreement and provides for the enforcement of the arbitration agreement. *Ex parte Brice Building Co., Inc.*, 26 A.B.R. 4250, 4253 (Ala. July 17, 1992).

6. Section 2 of the Federal Arbitration Act provides in part as follows:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or at equity for the revocation of any contract.

9 U.S.C. Section 2 (1947). Section 1 of the Federal Arbitration Act defines commerce very broadly to include commerce among the several states. 9 U.S.C. Section 1 (1947). Section 3 of the Federal Arbitration Act directs any court in the United States to stay an action pending arbitration if the action brought before that court includes any issue referable to arbitration under the terms of the Act. 9 U.S.C. Section 3 (1974).

7. The Alabama courts have found the Federal Arbitration Act to be applicable when there is a written contract containing an arbitration provision and when the contract involves interstate commerce. *Ex parte Brice Building Co., Inc.*, 26 A.B.R. 4250, 4253 (Ala. July 17, 1992); *Ex parte Shamrock Food Service, Inc.*, 514 So.2d 921 (Ala. 1987); *Ex parte Costa and Head (Atrium), Ltd.*, 486 So.2d 1272, 1275 (Ala. 1986). In the context of construction cases, Alabama courts have construed the requirement of interstate commerce very broadly so that the slightest nexus of the agreement with interstate commerce will bring the agreement within the Federal Arbitration Act. *Ex parte Brice Building Co., Inc.*, 26 A.B.R. at 4254-4257; *Ex parte Costa and Head (Atrium), Ltd.*, 486 So.2d at 1275. In these cases, the construction was to be totally performed within the State of Alabama, but the courts still found the Federal Arbitration Act to be applicable because of the involvement of interstate commerce.

8. In the *Costa* case, the court found the following facts sufficient to support a finding of an involvement of interstate commerce: when one of the parties is a limited partnership with partners outside the State of Alabama, when the principal place of business of one of the parties is outside the State of Alabama, and when part of the materials incorporated into the project came from outside the State of Alabama and are transported into Alabama. *Ex parte Costa and Head (Atrium), Ltd.*, 486 So.2d at 1275. In the *Brice* case, the contract involved an

Alabama plaintiff and Alabama defendants with the contract negotiated and to be executed in the State of Alabama, but the court still found the Federal Arbitration Act to be applicable because of the use of out-of-state building materials and possibly an out-of-state subcontractor to perform part of the work. *Ex parte Brice Building Co., Inc.*, 26 A.B.R. at 4256. Even though the connection with interstate commerce in the *Brice* case was found to be tenuous by the Alabama Supreme Court, the court found the same to be sufficient to invoke the provisions of the Federal Arbitration Act. *Id.*

9. In the context of the purchase of a consumer good within the State of Alabama, the Alabama Supreme Court has enunciated a little different standard as far as the requirement of interstate commerce to invoke the Federal Arbitration Act. *Ex parte Williams*, 555 So.2d 146 (Ala. 1989); *Ex parte Warren*, 548 So.2d 157 (Ala. 1989). In these cases, an Alabama resident had purchased an automobile from a Alabama dealership with offices only within the State of Alabama and the only connection with interstate commerce was the fact that the automobile had been manufactured outside the State of Alabama. *Ex parte Williams*, 555 So.2d at 148; *Ex parte Warren*, 548 So.2d at 159-160. The courts in these narrow fact situations considered whether the parties at the time that they entered into these contracts contemplated substantial interstate activity. *Ex parte Warren*, 548 So.2d at 159-160. The court in the *Warren* case also found that the facts of that case did not meet the standard established for interstate commerce in the *Costa* case.

10. The Alabama Supreme Court has found that the standard followed in the *Warren* and *Williams* cases is strictly limited to the narrow factual context found in these cases. *Ex parte Brice Building Co., Inc.*, 26 A.B.R. at 4255-4256. However, the facts of the present case supporting the involvement of interstate commerce clearly meet the standards enunciated in either *Costa* or *Warren.*

11. The affidavit of W. Bruce Alverson establishes that Defendant Terminix Service, a corporation organized under the laws of the State of Arkansas, has offices located in several states and that a large portion of the materials and equipment used to treat the home involved in this suit, including specifically the chemical, were purchased outside the State of Alabama by said Defendant and transported into this state. The affidavit of Daniel F. Johnson shows that Defendant Terminix International is a limited partnership organized under the laws of a state other than Alabama and that its principal place of business is located in Memphis, Tennessee. This affidavit also establishes that Defendant Terminix International has offices located outside the State of Alabama and that the general partner and limited partner of said Defendant are located outside this state. The termite protection plan made the basis of the claims asserted by Plaintiffs Dobson and Defendants Gwin was issued by Defendant Terminix Service, and the same was guaranteed by Defendant Terminix International.

12. These facts show substantial interstate activity as enunciated in the *Warren* case and establish the significant connections that the termite protection plan involved in this case has with interstate commerce. The termite protection plan made the basis of the claims asserted by Plaintiffs Dobson and Defendants Gwin against Defendants, Terminix Service and Terminix International, clearly involves interstate commerce, and the Federal Arbitration Act is applicable to this written contract which calls for arbitration of any claim between the parties arising out of or relating to the agreement. If a written contract containing an arbitration clause comes within the provisions of the Federal Arbitration Act, a court must stay its proceedings if it is satisfied that an issue brought before it is arbitrable under the agreement. *Ex parte Shamrock Food Service, Inc.*, 514 So.2d 921, 922 (Ala. 1987).

13. After a court determines that a written agreement containing an arbitration clause comes within the provi-

sions of the Federal Arbitration Act, the court then must decide what issues involved in the suit before the court are arbitrable. *A.G. Edwards & Sons, Inc. v. Clark*, 558 So.2d 358, 361 (Ala. 1990) (quoting *Morgan v. Smith Barney Harris Upham & Co.*, 729 F.2d 1163, 1165 (8th Cir. 1984) and *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1, 24-25 (1983)). The determination of the scope of an arbitration provision included in a contract is a matter for the court. *Explo, Inc. v. Southern Natural Gas Co.*, 788 F.2d 1096, 1098 (5th Cir. 1986); *Ex parte Warrior Basin Gas Co.*, 512 So.2d 1364, 1370 (Ala. 1987).

14. If a court cannot find with *positive assurance* that an arbitration clause coming within the terms of the Federal Arbitration Act was intended to exclude a claim asserted in a suit, then the court should stay the action pending arbitration and order the parties to submit the claim made the basis of the suit to arbitration. *Ex parte Warrior Basin Gas Co.*, 512 So.2d 1364, 1370 (Ala. 1987) (Emphasis added). Any doubts as to whether a claim involved in a suit comes within the provisions of an arbitration clause should be resolved in favor of arbitration. *Neal v. Hardee's Food Systems, Inc.*, 918 F.2d 34, 37 (5th Cir. 1990); *Ex parte Shamrock Food Service, Inc.*, 514 So.2d 921, 922 (Ala. 1987). In the *Neal* case, the Fifth Circuit Court of Appeals found claims for fraud, deception, bad practices, breach of contract and breach of good faith subject to arbitration pursuant to a broad arbitration clause included in a general agreement establishing the relationship between the parties. *Neal*, 918 F.2d at 38.

15. Alabama courts and Federal courts have found broad arbitration clauses to encompass tort claims asserted between parties to written agreements, and the courts have not allowed parties to escape their agreements to arbitrate matters by sounding their claims in tort. *McBro Planning and Development Co. v. Triangle Electrical Construction Co., Inc.*, 741 F.2d 342, 344 (11th

Cir. 1984); *see Ex parte Costa and Head (Atrium), Ltd.*, 486 So.2d 1272, 1276 (Ala. 1986). The joinder of arbitrable claims with claims between other parties which are not arbitrable will not prevent a court from staying an action and directing the parties to arbitrate the claims covered by the written agreement. *Ex parte McKinney*, 515 So.2d 693, 701 (Ala. 1987) (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985)). A trial court has no discretion to deny arbitration on the grounds of judicial economy, possible inconsistent results or the existence of non-arbitrable claims. *Ex parte Costa and Head (Atrium), Ltd.*, 486 So.2d 1272, 1276 (Ala. 1986).

16. The arbitration clause contained in the termite protection plan involved in the present suit is very broad and covers any controversy or claim between the parties arising out of or relating to the written agreement between the parties. The claims asserted by Plaintiffs Dobson in this suit against Defendants, Terminix Service and Terminix International, arise out of or relate to the termite protection plan containing the arbitration clause.

17. Plaintiffs Dobson have asserted against Defendants, Terminix Service and Terminix International, claims for alleged breach of the termite protection plan, for alleged fraudulent misrepresentation concerning a visual inspection of the home involved in this suit which was performed free of cost because of the existence of the termite protection plan, and alleged negligent inspection of the home during the visual inspection performed as part of the termite protection plan. Clearly, the claim for breach of the termite protection plan asserted against Defendants, Terminix Service and Terminix International, by Plaintiffs Dobson comes within the language of the arbitration clause contained in the agreement. Even though the other two claims sound in tort, the same arise out of or relate to the agreement between the parties because the inspection was performed free of charge by Defendant Terminix Service due to the existence of the

termite protection plan. (See deposition of George Walter Adkison, page 41, and deposition of William Daniel Calhoun, page 20).

18. The broad language contained in the arbitration clause prevents this Court from finding with positive assurance that the tort claims asserted by Plaintiffs Dobson against Defendants, Terminix Service and Terminix International, were intended to be excluded from the coverage of the clause. Any doubts as to the coverage of the arbitration clause should be construed in favor of arbitration, and Plaintiffs Dobson should be required to submit all claims asserted against Defendants, Terminix Service and Terminix International, to arbitration. Plaintiffs Dobson are parties to a written agreement containing an arbitration clause which is very broad and which encompasses all claims asserted by Plaintiffs.

19. As far as the cross-claim asserted by Defendants Gwin, these claims clearly come within the broad language of the arbitration clause included in the termite protection plan originally issued to Defendants Gwin by Defendant Terminix Service. Defendants Gwin assert two claims against Defendants, Terminix Service and Terminix International, for breach of contract and for negligent inspections, treatments and performance of contractual duties. Even though one of these claims sounds in tort, the contractual duties made the basis of the negligence claim arise out of the obligations included in the termite protection plan containing the arbitration clause. Again, this Court cannot find with positive assurance that the broad language of the arbitration clause included in the termite protection plan was intended to exclude the claims asserted by Defendants Gwin against Defendants, Terminix Service and Terminix International. These claims are clearly governed by the broad language of the arbitration clause included in the written agreement between the parties.

20. The Federal Arbitration Act is applicable to the termite protection plan involved in this suit due to the

interstate connections of Defendants, Terminix Service and Terminix International. The tort and contract claims asserted by Plaintiffs Dobson and Defendants Gwin against Defendants, Terminix Service and Terminix International, clearly arise out of or relate to the termite protection plan or the duties arising out of the same. If this Court considers the broad language of the arbitration clause included in the written agreement between the parties to this suit and resolves any doubt as to the scope of this clause in favor of arbitration, then the Court should stay this action pending arbitration of all claims asserted by Plaintiffs Dobson and Defendants Gwin against Defendants, Terminix Service and Terminix International, and should order the parties to arbitrate these claims.

WHEREFORE, Defendants, Terminix Service and Terminix International, move the Court for the entry of an order staying this action pending arbitration of the claims asserted by Plaintiffs Dobson and Defendants Gwin against Defendants, Terminix Service and Terminix International, and for the entry of an order compelling Plaintiffs Dobson and Defendants Gwin to arbitrate all claims asserted in this suit against Defendants, Terminix Service and Terminix International. Defendants, Terminix Service and Terminix International, request such other relief as the Court deems appropriate.

/s/ T. Julian Motes
JOSEPH P. JONES, JR.
T. JULIAN MOTES
Attorneys for Defendants,
Terminix International
Company, L.P. and
Allied-Bruce Terminix
Companies, Inc., d/b/a
Terminix Service

Of Counsel:

SIROTE & PERMUTT, P.C.
One St. Louis Centre, Suite 1000
Post Office Drawer 2025
Mobile, Alabama 36652

ORAL ARGUMENT RESPECTFULLY REQUESTED.

/s/ T. Julian Motes

(Certificate of Service Omitted in Printing)

IN THE CIRCUIT COURT
OF BALDWIN COUNTY, ALABAMA

(Title Omitted in Printing)

BRIEF OF G. MICHAEL DOBSON AND WANDA C. DOBSON IN OPPOSITION TO MOTION TO COMPEL ARBITRATION

[Filed Sep. 1, 1992]

Code of Alabama, Section 8-1-41 (1975), provides as follows:

> The following obligations cannot be specifically enforced:
>
> . . .
>
> (3) an agreement to submit a controversy to arbitration; . . . .

It is undisputed that the law of Alabama is that pre-dispute arbitration agreements are unenforceable. *Ex Parte Brice Building Company, Inc.*, 26 ABR 4250 (July 17, 1992).

On the other hand, the Federal Arbitration Act provides that pre-dispute arbitration provisions contained in contracts involving interstate commerce are enforceable. In all cases, then, the issue is whether or not a particular contract involves interstate commerce such that it is controlled by federal law rather than state law.

In this case, Terminix relies on *Ex Parte Costa and Head (Atrium), Limited,* 486 So.2d 1272 (Ala. 1986). That case involved a multi-million dollar commercial construction project in Alabama. One of the contractors had its principal place of business in Knoxville, Tennessee,

another in Rochester, New York, and another was a limited partnership composed of limited partners from other states outside Alabama. Additionally, subcontractors on the job were incorporated in various states, other than Alabama. Materials incorporated into the project were manufactured in other states and transported into Alabama. Under those facts, the Court held that interstate commerce was sufficiently involved in the transaction so as to allow federal law to preempt Alabama law and apply the Federal Arbitration Act.

It is our contention, however, that the case at hand is substantially different from *Costa*. The facts of this case involve a consumer transaction where an Alabama husband and wife purchased an Alabama residence from another Alabama husband and wife. Incidental to the sale of the home was the assignment to the purchaser of a termite protection plan issued by Terminix Services, another Alabama corporation. The entire transaction took place in Alabama without any out of state involvement.

Terminix, on the other hand, in an effort to find some interstate commerce involved in this purely local transaction, points to the fact that the chemicals which were used in treating termites at the home in Fairhope were purchased outside of Alabama; and the fact that Terminix also has offices outside of Alabama. We submit that this is simply not the same kind of case as *Costa* and that these connections with interstate commerce are too tenuous to justify the finding that federal jurisdiction has preempted very clear state law.

Our position is clearly supported by two decisions of the Alabama Supreme Court. In *Ex Parte Warren,* 548 So.2d 157 (Ala. 1989), cert. den. 110 Sup.Ct. 554, and in *Ex Parte Williams,* 555 So.2d 146 (Ala. 1989), the Supreme Court refused to find sufficient involvement with interstate commerce so as to apply federal law. Both *Warren* and *Williams* involved cases where consumers visited an Alabama car dealership and purchased auto-

mobiles which had been manufactured out of state. In each case, the sales contract included an arbitration clause. When sued over the sales contract, the car dealership attempted to invoke the arbitration clause saying that federal law was controlling because the automobile was manufactured outside of Alabama. In each case, *Costa* was cited by the dealership as authority for applying the Federal Arbitration Act. However, in each case, the Supreme Court refused, holding that

> (a)lthough we note that the language quoted from *Ex Parte Costa and Head* is very broad, we find, nonetheless, that, under the particular facts of this case, the transaction in question does not involve interstate commerce, as contemplated by the FAA; and, therefore, we hold that the provisions of the federal legislation are not controlling. *Warren, supra,* 159.

The Court in *Warren* noted that there was no reason to anticipate that the parties to that transaction had *contemplated* substantial interstate activity.

These cases were all recently analyzed by the Alabama Supreme Court in *Ex Parte Brice Building Company, Inc.*, 26 ABR 4250 (July 17, 1992). That case involved the construction of a mosque in Birmingham for the Zamora Shrine Temple. Obviously, this case involves another commercial construction contract, this time with a Delaware corporation. Importantly, however, that contract specifically called for an ornamental dome which would sit atop the mosque and which was to be fabricated and erected by a company in Torrence, California, and then shipped to Alabama. Under those facts, the Supreme Court held that *Costa* controlled and not *Warren* and that the transaction involved sufficient interstate commerce as to justify federal preemption.

The facts of the Terminix case are very much different, however, from either *Costa* or *Brice*. The distinction between these cases, on the one hand, and *Warren* and

Williams on the other, is clear. Obviously, it does not lie in the fact that there is some remote connection to interstate commerce. After all, practically every transaction in our lives has *some* connection with interstate commerce. The object of the contract in *Warren* and *Williams* was the purchase of an automobile, built in Detroit and shipped to Alabama; and in *Brice* it was the dome of a mosque which was to be built in California and shipped to Alabama. The distinction in these cases, however, obviously involves practical considerations having to do with the contemplation of the parties. In *Brice*, the parties knew that they were involving themselves in a transaction involving interstate commerce. In *Warren* and *Williams*, however, they were simply purchasing an automobile. We submit that the termite protection plan at issue here is more like *Warren* and *Williams* than it is *Brice* and *Costa*. Mike and Wanda Dobson involved themselves in a routine consumer transaction with no notion whatsoever that they might be involved in interstate commerce. The Terminix office was in Daphne and there was no hint of any interstate activity. *Costa* and *Brice*, however, involved large commercial construction contracts where the parties expressly provided for interstate activity. That is the distinction between these lines of cases and for that reason the Alabama prohibition against predispute arbitration agreements is controlling. The Motion to Compel Arbitration should be denied.

Respectfully submitted,

/s/ Allan R. Chason
ALLAN R. CHASON
Attorney for Plaintiffs

Of Counsel:

CHASON & CHASON, P.C.
P.O. Box 100
Bay Minette, Alabama 36507

(Certificate of Service Omitted in Printing)

THE CIRCUIT COURT OF BALDWIN COUNTY

Case No. CV 91-796

G. MICHAEL DOBSON, *et al.*

vs.

THE TERMINIX INTERNATIONAL CO., *et al.*

Motion for order compelling arbitration and for order of stay pending arbitration is denied.

/s/ James H. Reid
Judge

SUPREME COURT OF ALABAMA
SPECIAL TERM, 1993

1920473

ALLIED-BRUCE TERMINIX COMPANIES, INC., *et al.*

v.

G. MICHAEL DOBSON, WANDA C. DOBSON,
STEVEN GWIN, and JAN GWIN

Appeal from Baldwin Circuit Court
(CV-91-796)

ALMON, JUSTICE.

The defendants, Allied-Bruce Terminix Companies, Inc. ("Terminix Service"), and Terminix International Company ("Terminix International") appeal from an order of the trial court denying their motion to compel arbitration of the tort and breach of contract claims filed against them by Michael Dobson, Wanda Dobson, Steven Gwin, and Jan Gwin. The issue for our review is whether the arbitration clause contained in a termite bond is enforceable under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA").

In August 1987, Steven Gwin allowed the termite bond on his house in Fairhope, Alabama, to expire, and he purchased a replacement bond from Terminix Service. Terminix Service is an Arkansas corporation that does business in several states, including Alabama, Arkansas,

Florida, Georgia, Mississippi, Louisiana, Oklahoma, and Texas. The bond was guaranteed by Terminix International, a limited partnership that has its principal place of business in Memphis, Tennessee.

In 1991, Steven and Jan Gwin agreed to sell the house to Michael and Wanda Dobson. The sales contract required the Gwins to provide written evidence from a licensed pest control company that the company had performed a visual inspection of the house and had observed no active infestation of termites or damage from active infestation. The contract also required that the termite bond be transferred to the Dobsons at the closing of the sale. Because of the existing bond on the house, Terminix Service agreed to perform the inspection and to issue the required statement. At the closing, the Gwins furnished Dobson with a standard Veterans' Administration ("VA") form; the V.A. form provided that Terminix Service had observed no visible evidence of active infestation during the inspection.

The Dobsons later discovered termite damage to the house, and they brought an action against the Gwins, alleging fraud, and against Terminix Service and Terminix International, alleging fraud in connection with the representations in the V.A. form, and alleging breach of contract. The Gwins cross-claimed against Terminix Service and Terminix International. Terminix Service and Terminix International moved to stay the proceedings and to compel the Dobsons and the Gwins to submit their claims to arbitration pursuant to an arbitration clause in the bond. The trial court denied this motion, and the defendants appeal.

Predispute arbitration agreements are unenforceable under Alabama law. Ala. Code 1975, § 8-1-41. However, if an arbitration agreement is voluntarily entered into and is contained in a contract that involves interstate commerce, then the FAA preempts state law and renders the agreement enforceable. *A.G. Edwards & Sons, Inc.*

v. Syvrud, 597 So. 2d 197 (Ala. 1992). The Terminix companies contend that, because the United States Supreme Court has held in *Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), that Congress's regulatory power under the FAA is co-extensive with its commerce power, this Court should apply the "slightest nexus" standard first enunciated in *Ex parte Costa & Head (Atrium), Ltd.,* 486 So. 2d 1272 (Ala. 1986), to this situation. This standard provides that if the contract in question has the slightest nexus with interstate commerce, the FAA will apply. *Costa & Head*; *Ex parte Brice Building Co.,* 607 So. 2d 132 (Ala. 1992). Terminix Service and Terminix International argue that, because they are out-of-state entities, and because some of the materials used in fulfilling their duties imposed by the termite bond were brought into Alabama from out-of-state, the bond has at least a "slight nexus" with interstate commerce.

We need not address this argument, however, in light of this Court's decision in *Ex parte Jones,* [Ms. 1920249, July 16, 1993] —— So. 2d —— (Ala. 1993).[1] In *Jones,* we explicitly rejected the *Costa & Head* "slightest nexus" standard in favor of the standard enunciated in *Ex parte Warren,* 548 So. 2d 157 (Ala. 1989), cert. denied, 493 U.S. 998, 110 S.Ct. 554, 107 L.Ed.2d 550 (1989). We held:

> "To resolve any inconsistency or confusion generated by the existence of two different standards, and determining, as we now do, that *Warren* represents a more reasoned approach than the *Costa* standard, we overrule any case inconsistent with *Warren,* to the extent that it states a different standard for determining the involvement of interstate commerce."

—— So. 2d at ——. The *Warren* standard, which was invoked in *Warren* to cover only the "narrow" circum-

[1] See also *Continental Grain Co. v. Beasley,* [Ms. 1920241, July 16, 1993] —— So. 2d —— (Ala. 1993).

stances in which Alabama residents had purchased an automobile for consumer purposes from an in-state dealership, was first set forth by Judge Lombard in a special concurrence in *Metro Industrial Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382 (2d Cir.), cert. denied, 368 U.S. 817, 82 S.Ct. 31, 7 L.Ed.2d 24 (1961):

> "The significant question, therefore [in determining whether a contract evidences a transaction involving commerce], is not whether, in carrying out the terms of the contract, the parties *did* cross state lines, but whether, at the time they entered into it and accepted the arbitration clause, they *contemplated* substantial interstate activity. Cogent evidence regarding their state of mind at the time would be the terms of the contract, and if it, on its face, evidences interstate traffic . . . the contract should come within § 2 [of the FAA.] In addition, evidence as to how the parties expected the contract to be performed and how it was performed is relevant to whether substantial interstate activity was contemplated."

287 F.2d at 387 (emphasis in original).

Terminix Service and Terminix International argue that the bond involves interstate commerce even under the more restrictive *Warren* standard. In addition to the evidence cited above in support of their *Costa & Head* argument, the Terminix companies cite the following in support of their contention that at the time they entered into the contract the parties "contemplated substantial interstate activity": Steven Gwin's testimony that he allowed his bond with a local pest control company to expire so that he could "go with a national company like Terminix"; the fact that the bond instrument showed on its face that it was executed in Memphis, Tennessee; and the fact that the bond contained a statement that it was subject to federal regulation.

A brief survey of cases from other jurisdictions that have applied the standard will be useful in determining

whether the parties contemplated substantial interstate activity when they entered the termite bond.

Several cases applying the *Warren* standard involve contracts for the construction of large projects. In *Burke County Public Schools Board of Educ. v. Shaver Partnership*, 303 N.C. 408, 279 S.E.2d 816 (1981), the North Carolina Supreme Court held that a contract between a North Carolina school board and an Indiana architectural firm for the construction of school buildings did involve interstate commerce so as to be covered by the FAA. In so holding, the Court stated:

> "We do not mean to suggest that where the contracting parties are merely located in different states or where other facts tending only to show diversity of citizenship are present, the contract must necessarily be found to contemplate substantial interstate activity so as to trigger the act's applicability. Where, however, performance of the contract necessarily involves, so that the parties must have contemplated, substantial interstate activity, the contract evidences a transaction involving commerce within the meaning of the [FAA]."

303 N.C. at 418, 279 S.E.2d at 822. The Court then held that the following evidence established that when they entered into the contract the parties contemplated substantial interstate activity: certain contractual provisions called for the Indiana firm to come to the North Carolina building site for various reasons; accounting records on the project were maintained in Kansas; the Indiana firm dealt with suppliers from across the country in performing its contractual duties; and certain design work was performed by a Michigan firm. See also *G.D. Searle & Co. v. Metric Constructors, Inc.*, 572 F.Supp. 836 (N.D. Ga. 1983); *Dimambro-Northend Assocs. v. Blanck-Alvarez, Inc.*, 251 Ga. 704, 309 S.E.2d 364 (1983); *University Casework Systems, Inc. v. Bahre*, 172 Ind. App. 624, 362 N.E.2d 155 (1977).

Some courts have also held the FAA applicable to contracts for the construction of smaller projects. In *R.J. Palmer Constr. Co. v. Wichita Band Instrument Co.*, 7 Kan. App.2d 363, 642 P.2d 127 (1982), the Kansas Court of Appeals held that the FAA applied to a contract for the construction of a music store. The Court held that because the store was to be built out of California redwood, the parties knew that the contract would involve interstate activity.

A smaller number of cases applying the *Warren* standard involve personal service contracts. For example, in *Bennish v. North Carolina Dance Theatre, Inc.*, 108 N.C. App. 42, 422 S.E.2d 335 (1992), the North Carolina Court of Appeals held that a dancer and his employer contemplated substantial interstate activity when they entered the contract, because the contract provided guidelines on air travel and the employer introduced evidence that the dancer toured outside of North Carolina for a substantial amount of the contract period. See also *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972).

We conclude that the evidence adduced by the Terminix companies does not establish that the parties contemplated substantial interstate activity when they entered the termite bond. Initially, we note that we have held in *A.J. Taft Coal Co. v. Randolph*, 602 So. 2d 395 (Ala. 1992)—which was decided under the *Costa & Head* standard—that it is insufficent for the purposes of invoking the FAA merely to show that one or more of the parties to the contract is located in another state. Therefore, under the more restrictive *Warren* standard, the fact that the bond stated that it was executed in Tennessee is not determinative. Terminix's second piece of evidence, that the bond stated that it was subject to federal regulation, is based on the following paragraph in the bond:

> "Change in Law. Terminix performs its services in accordance with the requirements of federal, state, and local law. In the event of a change in existing law as it pertains to the services promised herein, Terminix reserves the right to revise the annual extension charge or terminate this agreement."

A bare statement in the bond that Terminix adheres to the requirements of any federal law applicable to its services simply does not show that the parties contemplated that the bond would involve substantial interstate activity in any way. Unlike the contractual provisions in *Bennish, supra*, it certainly does not put the plaintiffs on notice of the likelihood of substantial interstate activity. Moreover, Gwin's statement that he wished to go with a "national" company is not evidence that he contemplated anything; that statement merely reflects a desire on Gwin's part to receive the added security that many people associate with a large, national company. Finally, the *performance* of the bond obligations did not involve interstate commerce to such a degree that the parties upon entering the contract must have contemplated substantial interstate activity. Although some materials used in fulfilling the bond obligations may have come from out-of-state suppliers, this is not analogous to those situations—such as the aforementioned construction contracts involving large projects, or contracts for personal services—where the interstate activity involved in the performance of the contract is so great that it cannot reasonably be said that the parties failed to contemplate substantial interstate activity when they entered into the contract. See *Terminix Int'l Co. v. Jackson*, [Ms. 1911842, Aug. 13, 1993] —— So. 2d —— (Ala. 1993).

For the foregoing reasons, the judgment of the trial court is due to be affirmed.

AFFIRMED.

Houston, Steagall, and Ingram, JJ., concur.

Kennedy, J., concurs in the result.

IN THE SUPREME COURT OF ALABAMA
SEPTEMBER 24, 1993

1920473

ALLIED-BRUCE TERMINIX COMPANIES, INC., *et al.*

v.

G. MICHAEL DOBSON, WANDA C. DOBSON, STEVEN GWIN, and JAN GWIN,

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(Baldwin: CV-91-796)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

ALMON J.—Houston, Steagall, Kennedy and Ingram, JJ., concur.